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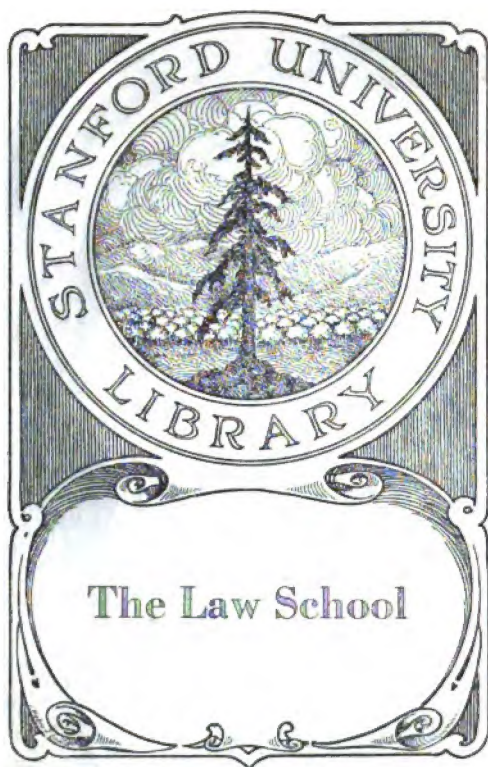
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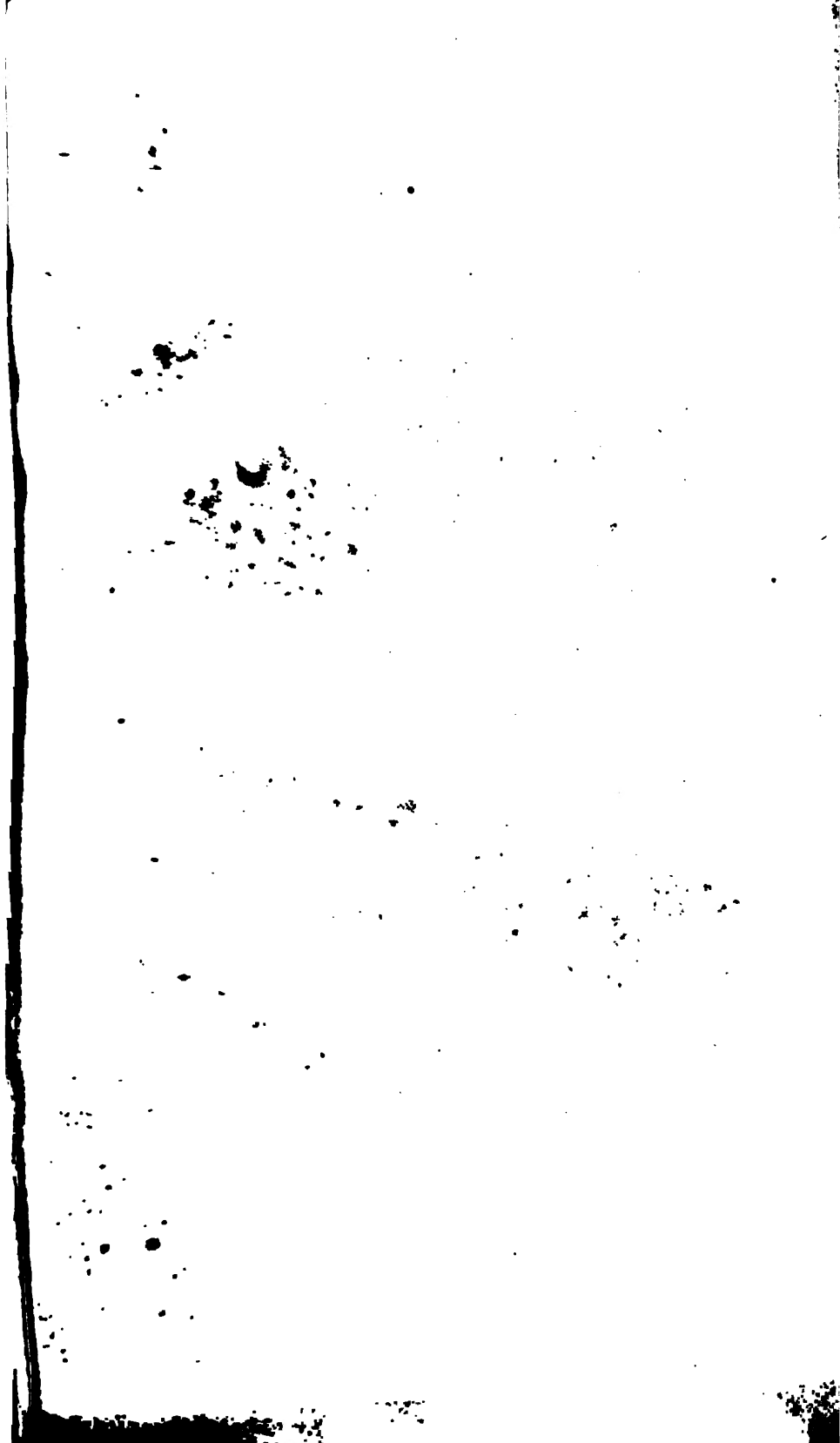
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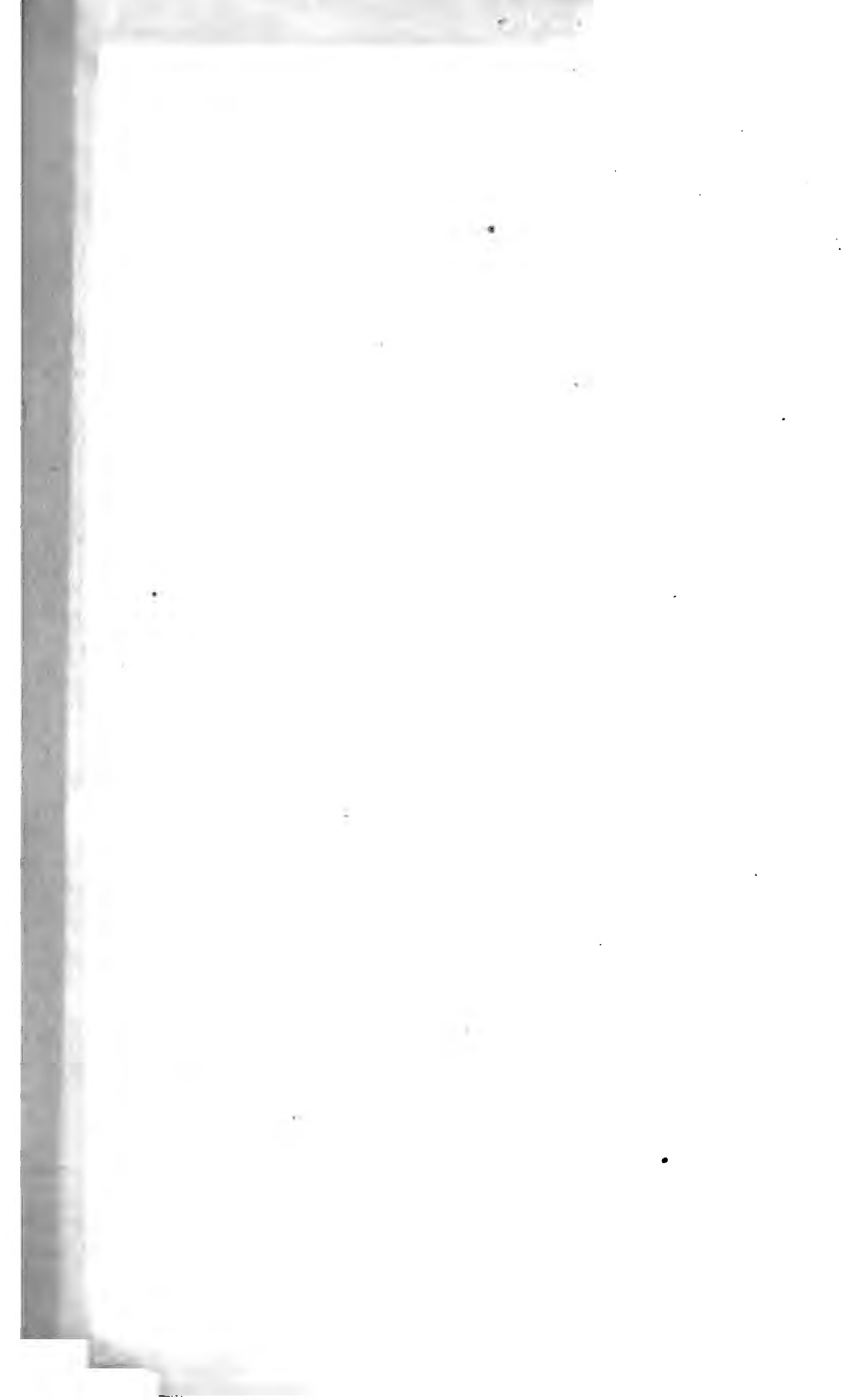
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME XV.

CONTAINING

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1 CHANCERY DIVISION, pp. 1-481.
1 COMMON PLEAS DIVISION, pp. 1-88.
18 COX'S CRIMINAL CASES, pp. 275-384.
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1 QUEEN'S BENCH DIVISION, pp. 1-83.

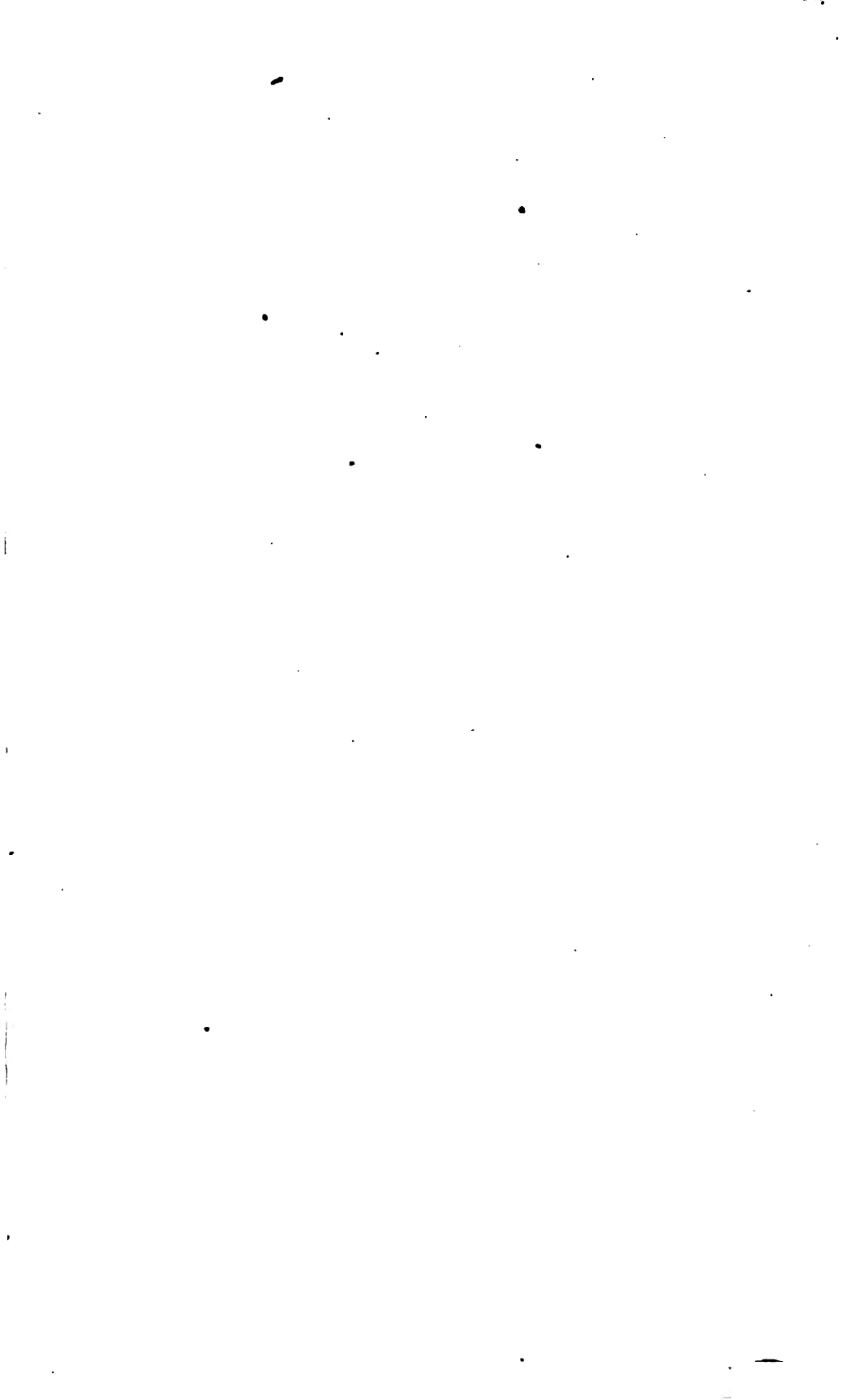
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It was further provided that if any person appointed under *that act* was at the date of his appointment a judge as aforesaid, he should vacate his office as such judge, but his pension should remain the same as if no such appointment had been made, and that each should receive a salary of five thousand pounds per annum.* It was further provided that the paid judges of the Judicial Committee of the Privy Council should hold their offices notwithstanding the demise of the crown, but they should be removable by Her Majesty, her heirs or successors upon the address of both Houses of Parliament.

THE HIGH COURT OF CHANCERY.

This court might properly be divided into four heads :

1. The Lord High Chancellor.
2. The Court of Appeal in Chancery.
3. The Master of the Rolls.
4. The Vice-Chancellors.

First. The jurisdiction and duties of the Lord Chancellor were too well known to require a detailed enumeration thereof. They are given in the "Practice in Chancery," Choyce Cases in Chancery (57-61). An appeal would lie from his judgments to the House of Lords.

Second. The Court of Appeal in Chancery.—An addition was also made (14 & 15 Vict. chap. 83 ; 30 & 31 Vict. chap. 64) of two judges called the Lord Justices of the Court of Appeal in Chancery ; which court consisted of the Lord Chancellor together with these judges and which possessed all the jurisdiction exercised by the Lord Chancellor himself, so far as his judicial business, in Chancery, was concerned, without prejudice, however, to his right to sit, as formerly, alone.

To this court, the powers of which might be exercised not only by its full body, but by either of its judges together with the Lord Chancellor, or by both the judges (or for some purposes by either of them sitting separately) apart from the Lord Chancellor. An appeal from the Master of the Rolls or from any of the Vice-Chancellors might be referred to it, or such appeal might be entertained by the Lord Chancellor, sitting alone, in his proper jurisdiction. This court also entertained appeals in bankruptcy. From these jurisdictions an ultimate appeal might be taken to the House of Lords.

Third. The Master of the Rolls.—The judicial duties of the Court of Chancery had been long shared, in some measure, by an officer of high rank called the Master of the Rolls who was originally appointed only for the superintendence of the writs and records appertaining to its common law department, but accustomed to sit also on the equity side as a separate, though a subordinate, judge. By statute (3 Geo. II, chap. 30), passed to settle divers disputes, it was enacted that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid, subject nevertheless to be discharged or altered by the Lord Chancellor. By a subsequent statute (3 & 4 William IV, chap. 94, sec. 24), the Master of the Rolls (subject to the same qualification) was especially directed to hear motions, pleas and demurrers, as well as causes generally which should be set down before him. Appeal might be taken from his judgment and was heard by the Lord Chancellor or the Court of Chancery Appeal, as heretofore stated. The origin of this officer, his oath of office and the duties of the incumbent are fully given in the "Practice in Chancery," Choyce Cases in Chancery (61–66.)

Fourth. The Vice-Chancellors.—The increase of business in the Court of Chancery rendered it necessary that an assistant to the Lord Chancellor, in his judicial functions, should be appointed. One was accordingly appointed in 1813 with the title of Vice-Chancellor. In 1841, after the transfer of the equity business of the Court of Exchequer to the High Court of Chancery, two more Vice-Chancellors were added to its judicial list. They sat and acted separately. An appeal from the decision of either might be taken, which was heard by the Lord Chancellor alone, by the Lord Chancellor sitting with the Lord Justices, or by the Lord Justices alone as heretofore stated.

COMMON LAW COURTS.

There were three courts of common law jurisdiction ; the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer, which, when mentioned collectively, were usually called the Superior Courts of the Common Law, and when taken in connection with the High Court of Chancery, were called the Courts at Westminster.

The judges were the legal advisers of the House of Lords and were frequently called upon by that body for their opinions upon questions of law before it.

PREFACE.

WITH this volume, commencing the cases under the English Judicature Act, a few words are necessary.

In order to understand the changes made by the Judicature Acts of 1873 and 1875, it is necessary to consider briefly the formation and powers of the courts in England before the passage of those acts, and then to show the changes effected thereby. We proceed, *firstly*, to show the construction and powers of such courts before those acts, borrowing quite largely from the preface to the second volume of these reports, and, *secondly*, to show the changes wrought by the Judicature Acts.

Before those acts the courts of England material to be inquired of were :

THE HOUSE OF LORDS.

The House of Lords was, as a general rule, a tribunal of appeal, in all causes of common law or equity, commenced in England, Ireland or Scotland, such appeal being original, or after the intervention of a previous appeal to another court, as the case might be. It was the court of last resort, from whose judgment no further appeal was permitted, and every subordinate tribunal was bound to conform to its determinations.

There was no appeal to the House of Lords from the Ecclesiastical, Maritime or Prize Courts in England, nor from India or any of the colonies. The appeal in such cases was to the Queen in Council and was heard before the Judicial Committee of the Privy Council.

THE PRIVY COUNCIL.

This, according to Sir Edward Coke (4 Inst., 53), was a noble, honorable and reverend assembly of the King, and such as he willed to be of his Privy Council, in the King's Court or Palace.

His will was the sole constituent of a Privy Councillor and this also regulated their number. The Privy Council was formerly dissolved by the death of the sovereign ; but by statute (6 Anne, chap. 7), the Privy Council continues for six months after the demise of the sovereign, unless sooner determined by his successor. So far as the present inquiry is concerned it may be stated that the Privy Council had in certain cases the judicial authority of a court of justice : 1. In Colonial causes ; this was both original and appellate ; 2. In appeals from the Lord Chancellor in matters of lunacy ; 3. In appeals from the ecclesiastical or maritime courts ; 4. In applications to prolong the term of patents for new inventions, and in certain cases arising out of the copyright acts.

Under the provisions of modern statutes all the judicial authority of the Privy Council was exercised by a select number of its members, called the Judicial Committee, which heard the allegations and proofs and made its report thereon to "Her Majesty in Council" by whom the judgment was finally given. By statute (3 & 4 William IV, chap. 41, sec. 1 ; 14 & 15 Vict. chap. 83, sec. 15), this committee consisted of the President of the Council, the Lord Chancellor, and the Lord Justices of the Appeal in Chancery, if of the Privy Council, the Lord Keeper or First Lord Commissioner of the Great Seal, the Lord Chief Justice of the Court of King's Bench, the Master of the Rolls, the Vice-Chancellors, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Court of Exchequer, the Judge of the Prerogative Court of Canterbury, the Judge of the High Court of Admiralty, the Chief Judge in Bankruptcy and also all persons who were members of His Majesty's Privy Council, who should have been president thereof or should have held the office of Lord Chancellor or any of the offices before mentioned. Two other persons, being members of the Council, might also be appointed by the Crown to be members of the Judicial Committee. No matter could be heard or report made unless in the presence of at least three of the committee, exclusive of the Lord President for the time being.

By 34 & 35 Vict. chap. 91 (Aug. 21, 1871), the Queen was authorized to appoint four additional persons members of the Judicial Committee of the Privy Council who should be or should have been judges of the Superior Courts at Westminster, or a Chief Justice of the High Court of Judicature at Fort William in Bengal, or Madras or Bombay.

THE QUEEN'S BENCH.

The sovereign formerly sat in this court, in person, and hence it was called the King's Bench in the reign of a king and the Queen's Bench in the reign of a queen.

It was the Supreme Court of Common Law in the kingdom and consisted of a Chief Justice, styled the Chief Justice of England, and five *puisne* justices. Its jurisdiction was very high and transcendant. It kept all courts of inferior jurisdiction within the bounds of their authority, and might either remove their proceedings, to be therein determined, or prohibit their progress below. It superintended all civil corporations in the kingdom, and commanded magistrates and others to do what their duty required in every case where there was no other specific remedy. It protected the liberty of the subject by speedy and summary interposition.

It took cognizance of both criminal and civil causes; the former on what is called the *crown* side; the latter on the *plea* side of the court. On the crown side it had jurisdiction of all criminal offences, from the highest to the lowest; on the plea side, or civil branch, it enjoyed (though originally by usurpation, as in the case of the Exchequer) a general jurisdiction and cognizance over all actions between subject and subject—those of the real class only excepted. It did not meddle, however, with matters of revenue. Proceedings in error might be taken from this court into the Exchequer Chamber.

THE COMMON PLEAS.

By the charter of King John, confirmed and acted upon by Henry III, the Court of Common Pleas was directed to be held "in some certain place." This court had jurisdiction of and heard causes between private individuals—of all actions between subject and subject. It was sometimes technically called the Court of Common Bench. Its judges were six in number: one Chief Justice and five *puisne*: and from a judgment in this court, proceedings in error might be taken into the Exchequer Chamber. It has always been considered the principal seat of learning relative to ordinary actions between man and man and is styled by Coke (4 Inst., 99), "the lock and the key of the common law."

THE COURT OF EXCHEQUER.

This court was at first intended, principally, to order the revenues of the crown and to recover the king's debts and duties, though it

had since acquired — originally by usurpation — the additional character of an ordinary court of justice.

It was called the Exchequer from the chequed cloth, resembling a chess board, which covered the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters.

This court was from the time of the separation of the Exchequer from the *aula regia* down to 1841, subdivided into a court of equity and of common law.

In 1841 its powers and jurisdiction as a court of equity were transferred to the Court of Chancery. It consisted of a *revenue* side, and of a common law, or *plea* side. As a court of law, on the revenue side, it ascertained and enforced, by proceedings appropriate to the case, the proprietary rights of the crown against the subjects of the realm; in the capacity of a court of common law on the *plea* side, it administered redress between subject and subject in all actions personal, though not in real actions. Its judges were termed *Barons* and were six in number, one of whom was styled the Chief Baron.

Proceedings to correct any error that might be found in the judgment of this court might be taken into the Exchequer Chamber.

THE EXCHEQUER CHAMBER.

This court was a court for the review of judgments of the Courts of Common Pleas, Queen's Bench, and Exchequer.

It consisted of all the judges of the three last-named courts and occasionally the Lord Chancellor. In review of a judgment of the court below, the judges of the court in which the judgment was rendered, did not sit; so that on appeal from the Common Pleas, the judges of the King's Bench and the Barons of the Exchequer composed the court; on appeal from the King's Bench the judges of the Common Pleas and the barons of the Exchequer, and on appeal from the Exchequer the judges of the Common Pleas and the King's Bench.

From the judgment of the Exchequer Chamber proceedings in error might be taken to the House of Lords. Its decisions were published with those of the court from which the appeal was taken.

THE COURT FOR CROWN CASES RESERVED.

By statute, certain trial courts of Criminal Jurisdiction — Courts of Oyer and Terminer and Gaol Delivery, or Quarter Sessions,—

when the court found in the case questions of law too difficult to determine, might reserve the question and state it in the form of a special case for the consideration and judgment of the judges of the superior courts, and in the meantime postpone the judgment or respite the execution of it as might be thought fit. The question was then considered and decided by the judges of the Superior Courts of the Common Law. This court was sometimes called the Court of Criminal Appeal. It had no jurisdiction of cases arising on demurrer, and there was no appeal from its judgments (*Regina v. Faderman*, 3 Car. & Kirw., 353, 4 Cox, 359).

THE CENTRAL CRIMINAL COURT.

There was a court—some of the decisions of which are herein reported—called the Central Criminal Court, for the trial of offences committed in London, Middlesex and certain suburban parts of Essex, Surry and Kent, composed of the Lord Mayor of London; the Lord Chancellor or Lord Keeper; the Judges of the Courts at Westminster; the Judge of the Admiralty; the Dean of the Arches, the Aldermen of London; the Recorder and Common Serjeant of London; the Judge of the Sheriff's Court there; any person who had been Lord Chancellor or Lord Keeper, or a judge of any of the courts at Westminster, and such others as the crown shall from time to time appoint. The crown was authorized to issue a commission of Oyer and Terminer and Gaol Delivery to such court, and the judges or any two or more of them held a session in the city of London or the suburbs thereof at least twelve times in every year. The Court of Queen's Bench might also remove into that court any indictment in any inferior court for a crime committed in a place out of the jurisdiction of the Central Criminal Court and order the trial thereof to be had at the Central Criminal Court, provided it appeared expedient to the ends of justice that such course be taken. The Central Criminal Court was usually held by one or more of the Judges of the Superior Courts of Law, the Common Serjeant and the Judge of the Sheriff's Court.

ADMIRALTY COURTS.

The Maritime Courts consisted of the High Court of Admiralty and its Court of Appeal. In Her Majesty's possessions, beyond seas, there were also established courts called Vice Admiralty Courts having jurisdiction over a variety of maritime cases.

The High Court of Admiralty, held by the Judge of Admiralty, — the Judge of the Court of Probate may by a recent statute sit for him — had jurisdiction and power to try and determine all maritime causes, that is, such injuries as are committed on the high seas. An appeal might be taken from judgments of the High Court of Admiralty or the Vice Admiralty Courts to the Privy Council.

PROBATE COURTS.

The powers of a Court of Probate, substantially as understood by such a court in this country, were formerly exercised by the ecclesiastical courts. By statute, however, such powers were transferred to a court called the Court of Probate which sat in London or Middlesex. "The judge thereof was required to be an advocate or barrister," and was appointed by patent under the great seal. An appeal would lie from its judgments to the House of Lords. Prior to the creation of this court the jurisdiction conferred thereon was exercised by the *Prerogative Court*, in each province, held before a judge appointed by the Archbishop thereof, for administering justice in testamentary matters, viz., those relating to probate and administration and in those only. Its jurisdiction arose in the case (an extremely frequent one) where the deceased left *bona notabilia* in different dioceses. As in this case the matter could not be disposed of in any single diocese, the Archbishop claimed the jurisdiction by way of special *prerogative*.

DIVORCE COURTS.

By statute, a court called the "Court for Divorce and Matrimonial Causes" was created, to be held (when full) before the Lord Chancellor, the judges of the Superior Courts together with the judge of the Court of Probate. The latter was judge *in ordinary* of the court, and when thus sitting alone was authorized to exercise in general the powers and duties of the full court.

ECCLESIASTICAL COURTS.

These courts had, it may be stated generally, jurisdiction of ecclesiastical questions and an appeal would lie from the highest of them to the Privy Council.

THE COURT OF ARCHES.

This court was a court of appeal belonging to the Archbishop of Canterbury, whereof the judge (who sat as deputy to the Arch-

bishop), was called the *Dean of the Arches*; because he anciently held his court in the church of St. Mary-le-bow, though this court is now holden at Westminster. His proper jurisdiction was over the thirteen peculiar parishes belonging to the Archbishop in London; but the office of *Dean of the Arches* having been for a long time united with that of the Archbishop's principal official, he, in right of the last-mentioned office (as doth also the principal official of the Archbishop of York), received and determined appeals from the sentences of all inferior ecclesiastical courts within the province. Many suits, also, were brought before him as original judge, the cognizance of which properly belonged to inferior jurisdictions within the province, but in respect to which the inferior judge had waived his jurisdiction, under a certain form of proceeding known in the canon law by the denomination of *letters of request*. From the Court of Arches and from the parallel Court of Appeal in the province of York an appeal would lie to the Privy Council. The Court of Arches and the Court of Appeal in York are not affected by the Judicature Act. By statute 3 & 4 Vict. ch. 65, the *Dean of the Arches* was declared to be an assistant to and to be competent to sit for the judge of the High Court of Admiralty in all suits and proceedings in the said court. We have not been able to discover that this has been changed by the Judicature Act.

THE CONSISTORY COURTS.

The Consistory Court of the Bishop was held in the several cathedrals, for the trial of all ecclesiastical causes arising within the diocese. The Chancellor of the diocese, or his commissary, was the judge, and from his sentence an appeal would lie, by virtue of 24 Hen. VIII, ch. 12, to the Archbishop of each province respectively. We do not discover that they are affected by the recent acts.

EFFECT OF THE JUDICATURE ACTS.

Such was the condition of the courts prior to the Judicature Acts.

We proceed, *secondly*, to consider the changes therein, wrought thereby.

By the act, termed the "Supreme Court of Judicature Act, 1873," and the amendments, the Supreme Court of Judicature is to consist of two permanent divisions, one of which under the name of "Her Majesty's High Court of Justice," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior courts as are therein mentioned, and the other of which, under the name of "Her

"Majesty's Court of Appeal," shall have and exercise appellate jurisdiction.

For all practical purposes here (by 39 & 40 Vict., chapter 59, § 6) the HOUSE OF LORDS retains its powers and functions to hear appeals from "Her Majesty's Court of Appeal in England, and from the courts of Scotland and Ireland."

By section 6, it is provided that for the purpose of aiding the House of Lords in the hearing and determination of appeals Her Majesty may appoint two qualified persons to be Lords of Appeal in ordinary, who must have been for at least two years of some one or more of the offices described in the act as high judicial officers, or have been for not less than fifteen years a practicing barrister in England or Ireland, or a practising advocate in Scotland. They are to receive a salary of six thousand pounds a year. If a Privy Councillor he is to be a member of the Judicial Committee of the Privy Council and to sit and to act as such. By section 14, upon the death or resignation of any two of the paid judges of the Judicial Committee of the Privy Council, Her Majesty is authorized to appoint another Lord of Appeal in ordinary, and upon the death or resignation of the other two of said paid judges, she may appoint still another.

By 38 & 39 Vict., section 4 of chap. 77 as amended by 39 & 40 Vict., section 15 of chap. 59, "HER MAJESTY'S COURT OF APPEAL," which practically takes the place of the Exchequer Chamber in appeals in common law actions, and also hears appeals in Chancery, previously heard by the Chancellor or by the Court of Appeal in Chancery in the exercise of its appellate jurisdiction, and of the same court as a Court of Appeal in Bankruptcy (§ 18, act of 1873), is to consist of *five ex officio* judges, consisting of the Lord Chancellor as president, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas and the Lord Chief Baron of the Exchequer, and *six* ordinary judges of the Court of Appeal, the first three additional judges to be made by transfer to the Court of Appeal of three judges of the High Court of Justice. Her Majesty may, by writing under her sign manual, transfer to the Court of Appeal from the Divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division and the Exchequer Division not exceeding three judges in number, as to Her Majesty shall seem meet; and every judge so transferred shall be deemed an additional ordinary judge of the Court of Appeal. Every additional ordinary

judge shall be under an obligation to go Circuits and to act as Commissioner under Commissions of Assize or other commissions authorized to be issued in the same manner in all respects as if he were a judge of the High Court of Justice. The ordinary judges of the Court of Appeal are to be styled, by the act of 1877, Lords Justices of Appeal.

By section 16 orders for constituting and holding divisional courts of the Court of Appeal (to consist of two or three and no more of the judges thereof, § 40, act 1873), and for the regulating of the sitting of the Court of Appeal and of the divisional Courts of Appeal may be made and rescinded by the President of the Court of Appeal, with the concurrence of the ordinary judges of the Court of Appeal or any three of them. No judge of the Court of Appeal shall sit as a judge, on the hearing of an appeal from any judgment or order made by himself or made by any divisional court of the High Court of which he was and is a member. Every appeal to the Court of Appeal from a final determination must be heard by at least three judges, and from an interlocutory order by not less than two.

THE HIGH COURT OF JUSTICE consists of five Divisions as follows :

1. The **CHANCERY DIVISION**, consisting of the Lord Chancellor, who shall be President, the Master of the Rolls, and the Vice-Chancellors of the Court of Chancery, or such of them as shall not be appointed ordinary judges of the Court of Appeal. By an act passed April 24, 1877 (12 L. J., 251), which has not yet reached us, a new judge to be in the same position as if he had been appointed a *puisne* judge of the High Court under the Supreme Court of Judicature Acts (1873 and 1875) was to be appointed. He is to be attached to the Chancery Division. The *puisne* judges are to be styled Justices of the High Court.

By section 3 of the act of 1875, the Lord Chancellor is not to be deemed to be a permanent judge of the High Court of Justice.

2. The **QUEEN'S BENCH DIVISION**, consisting of the Lord Chief Justice of England, who shall be President, and such of the other judges of the Court of Queen's Bench as shall not be appointed ordinary judges of the Court of Appeal.

3. The **COMMON PLEAS DIVISION**, consisting of the Lord Chief Justice of the Common Pleas, who shall be President thereof, and

such of the other judges of the Court of Common Pleas as shall not be appointed ordinary judges of the Court of Appeal.

4. The EXCHEQUER DIVISION, consisting of the Lord Chief Baron of the Exchequer, who shall be President thereof, and such of the Barons of the Court of Exchequer as shall not be appointed ordinary judges of the Court of Appeal.

Divisional courts of the High Courts of Justice may be held for the transaction of any business which may for the time being be ordered by rules of any court to be heard by a divisional court to be constituted of two of the judges of the court and no more unless the President of the Division to which such divisional court belongs, with the concurrence of the other judges of such Division, or a majority thereof, is of opinion that such divisional court should be constituted of a greater number of judges than two, in which case such court shall be constituted of such number of judges as the President, with such concurrence as aforesaid, may think expedient.

CROWN CASES RESERVED, under 11 & 12 Vict., chap. 78 and amendments, are (§ 48) to be heard by the judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. Their determination is final and without appeal save for some error of law upon the record as to which no question shall have been reserved for the consideration of said judges under 11 & 12 Vict. Its decisions are reported with those of the Queen's Bench Division.

5. THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION, consisting of two judges, one of whom shall be the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes and the Judge of the High Court of Admiralty. The Judge of the Court of Probate shall be the President of the said Division and subject thereto the senior judge of the said Division.

The present series of reports, in Alphabetical order, is as follows :

APPEAL CASES. Cases decided by the House of Lords and Privy Council.

CHANCERY DIVISION. Cases decided by that Division.

COMMON PLEAS DIVISION. Cases decided by that Division.

EXCHEQUER DIVISION. Cases decided by that Division.

PROBATE DIVISION. Cases decided by the Probate, Divorce, and Admiralty Division.

QUEEN'S BENCH DIVISION. Cases decided by that Division, and also *Crown Cases Reserved*.

The cases decided by the COURT OF APPEAL are reported with the cases of the Division from which the appeal was taken.

They are indicated at the head as, "In the Court of Appeal," or by the letters "C.A."

The different reports are quoted as follows :

- 1 Appeal Cases, or 1 App. Cas.
- 1 Chancery Division, or 1 Ch. Div.
- 1 Common Pleas Division, or 1 C. P. Div.
- 1 Exchequer Division, or 1 Ex. Div.
- 1 Probate Division, or 1 P. Div.
- 1 Queen's Bench Division, or 1 Q. B. Div.

NATHANIEL C. MOAK.

ALBANY, N. Y., July, 1877.

JUDGES.

LORD HIGH CHANCELLOR.

Right Hon. LORD CAIRNS, appointed 1874.

LORDS OF APPEAL IN ORDINARY.

Right Hon. LORD BLACKBURN, appointed 1876.

Right Hon. LORD GORDON, " "

PRIVY COUNCIL, JUDICIAL COMMITTEE.

| | |
|-----------------------------------|---|
| Right Hon. Sir JAMES W. COLVILLE. | } <i>Appointed under 34 & 35 Vict. ch. 91: usu- ally sitting.</i> |
| Right Hon. Sir BARNES PEACOCK. | |
| Right Hon. Sir MONTAGUE E. SMITH. | |
| Right Hon. Sir ROBERT P. COLLIER. | |

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Ex officio Members.

The Right Hon. the LORD HIGH CHANCELLOR (President).
The Right Hon. the LORD CHIEF JUSTICE of England.
The Right Hon. the MASTER OF THE ROLLS.
The Right Hon. the LORD CHIEF JUSTICE of the Common Pleas.
The Right Hon. the LORD CHIEF BARON of the Exchequer.

Ordinary Members.

| | |
|---|---------|
| Right Hon. Sir WILLIAM MILBOURNE JAMES, appointed 1870. | |
| Right Hon. Sir GEORGE MELLISH, ¹ | " " |
| Right Hon. Sir RICHARD BAGGALLAY, | " 1875. |
| Right Hon. Sir GEORGE WM. W. BRAMWELL, | " 1876. |
| Right Hon. Sir WILLIAM BALIOL BRETT, | " " |
| Right Hon. Sir RICHARD PAUL AMPHLETT, | " " |

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Right Hon. the LORD HIGH CHANCELLOR (President).
Right Hon. Sir GEORGE JESSEL, Master of the Rolls, appointed 1873.
Hon. Sir RICHARD MALINS, Vice-Chancellor, " 1866.
Hon. Sir JAMES BACON, " " 1870.
Hon. Sir CHARLES HALL, " " 1873.
Hon. Sir EDWARD FRY, Justice of the High Court,² " 1877.

¹ Died June 16, 1877: 12 Law Jour. 372.

² Appointed April 30, under the act of April 24, 1877: 12 Law Jour., 251.
15 ENG. REP.

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QUEEN'S BENCH DIVISION.

Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, Bart., G.C.B.,
 Lord Chief Justice of England, appointed 1859.
 Hon. Sir JOHN MELLOR, appointed 1861.
 Hon. Sir ROBERT LUSH, " 1865.
 Hon. Sir WILLIAM FIELD, " 1875.
 Hon. Sir HENRY MANISTY, " 1876.

COMMON PLEAS DIVISION.

Right Hon. LORD COLERIDGE, Lord Chief Justice of the Common Pleas,
 appointed 1873.
 Hon. Sir WILLIAM ROBERT GROVE, appointed 1871.
 Hon. GEORGE DENMAN, " 1873.
 Hon. Sir NATHANIEL LINDLEY, " 1875.
 Hon. Sir HENRY CHARLES LOPES, " 1876.

EXCHEQUER DIVISION.

Right Hon. Sir FITZ-ROY KELLY, Lord Chief Baron, appointed 1866.
 Hon. Sir ANTHONY CLEASBY, appointed 1868.
 Hon. Sir CHARLES EDWARD POLLOCK, " 1873.
 Hon. Sir JOHN WALTER HUDDLESTON, " 1875.
 Hon. Sir HENRY HAWKINS, " 1876.

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PROBATE, MATRIMONIAL, DIVORCE AND ADMIRALTY DIVISION.

Right Hon. Sir JAMES HANNEN (President), appointed 1872.
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APPEAL CASES
BEFORE THE
HOUSE OF LORDS
AND THE
JUDICIAL COMMITTEE
AND
LORDS OF HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL.

[Law Reports, 1 Appeal Cases, 39.]
J.C.⁽¹⁾, July 27, 28, 29; Nov. 9, 1875.
[PRIVY COUNCIL.]

***THE GARDEN GULLY UNITED QUARTZ MINING COM- [39
PANY (Registered), Defendants; and HUGH McLISTER,
Plaintiff.**

ON APPEAL FROM THE SUPREME COURT OF VICTORIA (IN EQUITY).

Shares—Invalid Forfeiture—Waiver—Acquiescence.

There must be properly appointed directors to make a call or to declare a forfeiture of shares.

A declaration of forfeiture (for non-payment of a call) of shares in a company registered in Victoria under 27 Vict. No. 228, was made on the 18th of June, 1869, by a resolution of the board of directors, consisting of a quorum of three, H., B., and A., who had been elected (with two others) at a quarterly general meeting of the company held on the 14th of April, 1869; which meeting had been convened by advertisement, published on the 8th, 10th and 13th of April, for the election of a full board of directors. It appeared that H. and A. had been previously elected directors on the 14th of January, 1867, had not retired from office as provided by the rules of the company, but had continued to act as directors up to the 14th of April, 1869:

Held, that the said meeting of the 14th of April, 1869, having been held without due notice thereof, according to the rules of the company passed under the provisions of 27 Vict. No. 228, and of the business to be transacted thereat, the election of a full board of directors thereby was invalid, and consequently the subsequent decla-

⁽¹⁾ *Present*.—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH and SIR HENRY S. KEATING.

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ration of forfeiture of the 18th of June, 1869, was also invalid. Even if H. and A. had before that election legally held office, they could not thereafter act under their former title, for the election of a full board, though invalid, necessarily involved the retirement of those, if any, who up to that time had legally held the office of director.

A declaration of forfeiture of shares invalid under the rules of a company registered under 27 Vict. No. 228, before Act No. 354 came into force, is not rendered valid by the latter act.

Merely that does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture.

THIS was an appeal from a decree of the Supreme Court of the colony of Victoria in equity dated the 8th of October, 40] 1874, *whereby it was declared that the forfeiture by the appellant company of certain shares held by the respondent in the appellant company ought to be set aside, and that the appellant company should pay to the respondent the dividends which had accrued due upon the shares in and since the month of July, 1871, after deducting certain unpaid calls thereon.

The appellant company is a company duly registered and incorporated under the provisions of the Colonial Act, 27 Vict. No. 228, its memorial of registration being dated the 18th of June, 1866. The respondent was, from the date of its incorporation, a holder of 2,181 shares.

The appellant company is carried on under certain rules and regulations made in the year 1866, in accordance with the Act 27 Vict. No. 228, and signed by a majority in number and value of the shareholders of the appellant company. The said rules and regulations, so far as they are material, are set out in the judgment of their Lordships.

The respondent filed his bill of complaint on the 21st of October, 1873.

The facts of the case and the proceedings in the suit are sufficiently set forth in the judgment of their Lordships, from which it will appear that the question of the validity of the forfeiture, which was set aside by the above-mentioned decree, ultimately depended on the validity of the election of the persons who, assuming to be directors, declared that the respondent's shares were forfeited for non-payment of a call purporting to have been made thereon.

Mr. Fry, Q.C., and Mr. W. F. Robinson, Q.C., for the appellants (after a preliminary objection by the respondents that the appeal ought to have been made, under Colonial Act 19 Vict. No. 13, s. 5, to the full court in Victoria had been overruled), contended that, having regard to the rules and regulations of the company, the board of directors by which the respondent's shares were declared to have been forfeited was duly constituted and was competent to act, and that its resolution of the 18th of June, 1869, and the

consequent forfeiture, were valid. The fifth call was duly made and advertised by the directors, and ought to have been paid by *the respondent. They relied upon the [4] fact that the respondent was present by proxy at the extraordinary meeting of the members of the company on the 16th of August, 1867, when a resolution was unanimously passed authorizing the directors to forfeit his shares. And, accordingly, at a directors' meeting duly convened by circular and held on the 23d of August, 1867, a resolution was passed declaring the forfeiture of the respondent's shares for non-payment of calls, which resolution was confirmed on the 20th of September, 1867, at a directors' meeting duly convened for that day. This resolution was empowered by the resolution of the 16th of August, 1867, passed at a meeting at which the respondent was present by proxy, and therefore no advertisement of the intention to forfeit was necessary. Again, the resolution of the 18th of June, 1867, was duly passed and advertised, and was in all respects a valid forfeiture of the shares. They relied upon Colonial Act No. 354, passed on the 29th of December, 1869, which, it was contended, removed any question as to the validity of so much of the original rules as related to forfeiture, and availed to establish the validity of any forfeiture effected under the resolution of the general meeting of the 16th of August, 1867: See sections 1, 2 and 4; and see *Schmidt v. Garden Gully Company* (*), and *Barfold Estate Gold Mining Company v. Klingender* (*). As regards the election of the directors, if any irregularity existed, the same did not invalidate the acts of the *de facto* directors in respect of the forfeiture, and such irregularity was waived by the company and the members thereof in general meeting, and also by the respondent.

Further, assuming that the respondent had at any time a right to relief against the forfeiture, he nevertheless, by his acquiescence in his exclusion from the company and his delay in asserting his claim to relief, had lost all right thereto. Such conduct amounted to a waiver or abandonment of his shares and of his interest therein, and precluded him from contending that they had not been forfeited, or that he continued to be the proprietor of them. Upon this point of acquiescence they referred to *Lawrence's Case* (*); *Senhouse v. Christian* (*); *Knight's Case* (*), *where a [42

• (1) 4 Australian Jurist, pp. 63, 137.

(2) 6 W. W. & A.B., 231 (Law).

(3) Law Rep., 2 Ch. Ap., 412.

(4) Reported in the note to *Hart v. Clarke*, 19 Beav., 356.

(5) Law Rep., 2 Ch. Ap., 321.

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resolution to forfeit was presumed: *Norway v. Rowe* (¹); *Prendergast v. Turton* (²); *Clegg v. Edmonson* (³); where it was held that a mere assertion of a claim, unaccompanied by any act to give effect to it, could not avail to keep alive a right which would otherwise be precluded: *Hart v. Clarke* (⁴); Lindley on Partnership [3d ed.], vol. ii. p. 951; *Clements v. Hall* (⁵); *Woollaston's Case* (⁶).

Mr. *De Gex*, Q.C., and Mr. *J. D. Wood*, for the respondent, contended that the appellants were not entitled now to raise for the first time the two points of acquiescence and of a valid forfeiture made on the 23d of August, 1867, such contentions not having been raised in the courts below. Moreover, the question of acquiescence being one of fact as well as law, could only be disposed of after evidence duly taken under an issue raised for that purpose. But upon such facts as appeared upon the record there was no sufficient evidence of the respondent having by his conduct waived his shares, acquiesced in their forfeiture, or estopped himself from averring that he continued to be the proprietor of them. Powers of forfeiture are *strictissimi juris*, they must exist by statute or the clear terms of a contract, and those terms must be strictly followed. There is no difference between law and equity in cases of this kind. The distinction is between executory and executed interests; in the former case it is necessary to be prompt. The respondent had a legal interest in his shares, it was executed, and did not require the assistance of a court to create it. The case, therefore, must be brought within the rule in *Pickard v. Sears* (⁷) in order to bind the respondent by any alleged acquiescence. *Clarke v. Hart* (⁸), relied upon on the other side, was not the case of a corporation, but of a partnership, and therefore there might have been a waiver in that case; but mere laches does not disentitle a plaintiff to equitable relief. *Prendergast v. Turton* (⁹) was not even a case where the legal estate was in the person forfeiting; it was a case, 43] also, of partnership, not of a *corporation: it was decided on the ground of abandonment, not of laches. In order to effect a valid forfeiture of shares for non-payment of a call, the call must have been regularly made by a board of directors who had been duly elected, and the shares after non-payment of the call must have been duly declared

(¹) 19 Ves., 144.

(²) 24 Beav., 333; 2 De G. & J.,

(³) 1 Y. & C. (N.S.), 98; before L.J.J., 173.

13 L. J. (Ch.), 268.

(⁴) 4 De G. & J., 437.

(⁵) 8 De G. M. & G., 787.

(⁶) 6 A. & E., 469.

(⁷) 19 Beav., 349; before L.J.J., 6 De G. M. & G., 232; 6 H. L. C., 633.

to be forfeited by a board of directors who also have been duly elected. They referred to *Naylor v. South Devon Railway Company* ⁽¹⁾; *Catchpole v. Ambergate Railway Company* ⁽²⁾; *Dalton v. Midland Railway Company* ⁽³⁾; *Howbeach Coal Company v. Teague* ⁽⁴⁾; *Nolan v. Arabella Gold Mining Company* ⁽⁵⁾; Lindley on Partnership, vol. ii. [3d ed.], p. 953. Shares in a company are not *choses in action*: *Ex parte Union Bank of Manchester, In re Jackson* ⁽⁶⁾.

Under the rules and regulations of the company the persons who made the alleged call of the 30th of April, 1867, had no power to make such a call, not being a board of directors duly elected; and, moreover, the persons who passed the resolution of the 18th of June, 1869, declaring that the respondent's shares were forfeited had no power to pass such resolution, not being a board of directors duly elected. There has, therefore, been no valid forfeiture of the shares.

Robinson, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK: The appellants are the defendants, and the respondent is the plaintiff in a suit instituted in the Supreme Court of Victoria.

The plaintiff was the holder of 2,181 shares in the Garden Gully United Quartz Mining Company, registered under the provisions of the Colonial Act, 27 Vict. No. 228, intitled "An act to limit the Liability of Mining Companies."

In the 11th paragraph of his bill he alleged that the defendants pretended that his, the plaintiff's, shares in the company were duly forfeited under and by virtue of a resolution passed by a board of directors on or about the 10th of June, 1869, for *non-payment of calls; but he [44 charged that, if any such resolution was passed, the persons passing the same were not a duly appointed board of directors of the same company; that, even if they were a duly elected board, the alleged calls, for non-payment of which such forfeiture was declared, were not lawfully made, and that he was not liable for payment of the same; that, in other respects, such declared forfeiture was invalid; and that the defendant company had no power to forfeit the said shares; and the defendants were required to set forth and discover how they made out the alleged forfeiture of

⁽¹⁾ 1 De G. & Sm., 32.

⁽²⁾ 1 E. & B., 111.

⁽³⁾ 13 C. B., 474.

⁽⁴⁾ 5 H. & N., 151.

⁽⁵⁾ 6 W. W. & A. B., 38, (Mining Ca.)

⁽⁶⁾ Law Rep., 12 Eq., 854.

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plaintiff's shares, with full particulars of the dates of the meeting or meetings at which the resolutions or resolution, declaring the shares forfeited, or empowering any board of directors to forfeit the same, was or were passed; and he prayed that the forfeiture of the said shares should be declared void, that he might be restored to the rights of a shareholder, and that the defendants might be ordered to pay to him the amount of dividends that had become due on his shares since the month of May, 1867; he, the plaintiff, offering to pay all calls and other liabilities then due upon or in respect of the said shares.

The defendants, in their answer, stated that on the 30th of April, 1867, a fifth call of 1s. per share, payable on the 10th of May following, was duly made upon the shareholders by a quorum of directors duly elected. They also alleged, in paragraph 11, that in the month of April, 1869, five directors were elected at a general meeting of the company,—no directors having been elected during the previous January; and that on the 21st of May, 1869, at a meeting of directors duly held, and at which a quorum was present, the manager was directed to advertise the intended forfeiture of all shares in the company on which the said fifth call had not been paid, unless the same and all calls in arrear were paid within twelve days from the date of the advertisement; that an advertisement to that effect, signed by the manager, was inserted in the Bendigo Advertiser newspaper, published in Sandhurst, on the 28th, 29th and 31st days of May, 1869, and the 2,181 shares of the plaintiff were specified in the said advertisement by reference to his name, and their distinctive numbers; that, on the 18th of 45] June, 1869, at another directors' meeting, *duly held, and at which a quorum was present, a resolution was duly passed that all the shares on which the said fifth call had not been paid, standing in the names of the parties therein mentioned should be, and the same were thereby, absolutely forfeited to the company, and that the plaintiff's was one of the names mentioned in the said resolution, in which his shares were specified by their distinctive numbers; and the defendants submitted the questions of law raised by the 11th paragraph of the bill to the judgment of the court.

Thus it appears that the only forfeiture relied upon by the defendants was one declared on the 18th of June, 1869, in consequence of the non-payment of the fifth call within twelve days from the date of the advertisement of which the last was published on the 31st of May, 1869.

The cause was heard before the Honorable Mr. Justice

Molesworth, who held, in accordance with the views of the full court in the case of *Schmidt v. Garden Gully Company* (¹), and in the judgment on appeal, in which he concurred (²), that there must be properly appointed directors to make a call and to declare a forfeiture; and that the election of five directors, a full board, at the quarterly meeting held on the 14th of April, 1869 (the meeting referred to in the 11th paragraph of the defendants' answer), was invalid under the rules; and that the case must follow that of *Schmidt v. Garden Gully Co.* (¹), which was in effect that the forfeiture declared by a quorum of those directors on the 18th of June, 1869, was invalid; and he gave a decree for the plaintiff, declaring, amongst other things, that the alleged forfeiture *in the pleadings mentioned* of the 2,181 shares of the plaintiff ought to be set aside, and that the plaintiff was entitled to the said shares and to the dividends declared thereon in and since the month of July, 1871, deducting thereout the fourth, fifth and sixth calls made by the company upon the said shares. The decree, it will be observed, was limited to the forfeiture mentioned in the pleadings, viz., the forfeiture declared at the meeting of the 18th of June, 1869, upon which alone, notwithstanding the express requirement in the 11th paragraph of the plaintiff's bill, the defendants relied in their answer.

*Their Lordships concur in the opinion expressed by [46 the learned judge that there must be properly appointed directors to make a call or to declare a forfeiture of shares; that the election of five directors at the quarterly meeting held on the 14th of April, 1869, was invalid under the rules of the company and the Colonial Act 27 Vict. No. 228; and consequently, that the forfeiture declared by three of those directors on the 18th of June, 1869, was also invalid.

The Supreme Court held, in *Schmidt's Case* (¹), that the fifth call was duly made. It is unnecessary to express any decisive opinion upon that point, as, whether the call was legally made or not, the decree must be affirmed, if there was no valid forfeiture for the non-payment of the call.

Their Lordships will, therefore, proceed to state their reasons for considering that there was no valid forfeiture of the shares.

By the 39th section of Act No. 228, to which reference has been made, the majority in number and value of the shareholders in any company were authorized, from time to time, both before and after incorporation, to make and alter rules for prescribing the number and qualification of

(¹) 4 Australian Jurist, p. 63.

(²) 4 Australian Jurist, p. 137.

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directors, and fixing a quorum thereof, for holding and convening general and special, but not extraordinary, meetings of the shareholders and directors respectively; for the election, removal and *annual retirement of all, or some of the directors*; for determining the mode of filling occasional vacancies in that body, &c.; for making calls; for the transfer and relinquishment of shares, and the conditions on which the same respectively might be affected; and for any other object not inconsistent with the act: Provided that if any such rule should be made or altered after incorporation, it should be made or altered only at an extraordinary meeting of shareholders.

It is to be observed that no power was given by that section to make rules for the forfeiture of shares; but by an act of the Colonial Legislature, No. 354, passed on the 29th of December, 1869, it was enacted that any company then incorporated under Act No. 228 should have, and should be deemed to have had power to make rules in the manner pointed out by the 39th section of the said act to provide for the forfeiture of shares.

47] *The defendant company was incorporated before the passing of that act, and by rules passed before incorporation, and which were signed and sealed by the plaintiff, provision was made for convening and holding general and extraordinary meetings of the shareholders; the number and qualification of directors; for fixing a quorum thereof; for the election, removal and retirement (whether annual retirement or not, as required by the act, will be presently considered) of all or some of the directors; for determining the mode of filling occasional vacancies in that body; and for the forfeiture of shares for the non-payment of calls.

Amongst others the following rules were made:

Rule 8 was as follows: "The first general meeting of the company shall be held some time during the first fourteen days of the month of October, 1866, at such place in Sandhurst as the directors may appoint, and thereafter a general meeting of the shareholders shall be holden within the first fourteen days of the months of January, April, July and October; such meetings shall be called general meetings, and shall have full power to regulate and control all the affairs of the company, *and every such meeting shall be convened by the manager or by the directors, by giving notice according to the Act, Vict. 27, No. 228.*"

By rule 9 provision was made for calling extraordinary meetings; and by sect. 23, Act No. 228, it was enacted that fourteen days' notice of every extraordinary meeting should

be given to each shareholder, by inserting the same in six consecutive numbers of some newspaper published in Melbourne, and in six consecutive numbers of some newspaper in the neighborhood of the place of operations of the company; that such notice should be signed by the manager, and should specify the place, the day, and the hour of meeting, and the nature of the business; otherwise that such meeting should not have power to transact any business, &c.

That section was the only one requiring notice of meetings.

Rule 9 was as follows: "The board of directors, or any twelve or more shareholders possessing collectively 6,000 shares, may at any time, by a requisition in writing addressed to the manager, require the manager to call an extraordinary meeting of the shareholders, and every *such meeting shall be summoned or convened within [48 sixteen days of such requisition being lodged with the manager, or at the office of the company."

By rule 10 it was declared that at all meetings each shareholder should be entitled to one vote for every share held by him in the company; that any shareholder might vote in person or by proxy; and that no law, resolution or proceeding passed at any meeting should be impeached or invalidated on the ground that any person voting at any such meeting was not entitled to vote thereat, or upon any other ground whatsoever, unless put forward at the time.

Rule 17 provided that a board of directors, consisting of five shareholders, should be elected at each general meeting of the company, held in January and July in each year; that the directors should continue in office until the next general meeting of the company, when the three directors receiving the lowest number of votes at the first general meeting should retire, but be eligible for re-election; and that the other directors should retire at the next general meeting, but be subject to re-election. Provided that if, through any cause, the general meetings of the company were not or could not be held at the time thereinbefore appointed for the holding of such meetings, then the directors who would have retired if such meeting had been held should continue in office, and should in all respects be considered as re-elected.

The rule also provided for any director vacating office, and for the appointment of a director in his place.

By rule 19 it was declared that the board of directors might make calls (subject to the limitations thereafter provided) or declare dividends; that the powers of the di-

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rectors should not cease or be suspended so long as the board of directors should consist of a sufficient number of members to form a quorum.

By rule 21 it was declared that three directors shall form a quorum, and shall have and exercise all the powers and authorities vested in the board of directors generally, as fully and effectually as if all the directors had concurred therein.

By sect. 5, Act No. 228, it was enacted that the amount of calls unpaid upon any share should be deemed a debt due from the holder of the share to the company.

49] *By Nos. 29 and 30 of the company's rules it was declared that if any shareholder should neglect or refuse to pay any such call for the space of one month from the day appointed for the payment of the same, the directors should either proceed to enforce the payment thereof in manner prescribed by the Act 27 Vict. No. 228, or might proceed to declare the shares of such defaulting shareholder forfeited at any board meeting to be held after the expiration of six weeks from the day appointed for the payment of such call, and upon such declaration of forfeiture such defaulting shareholder should cease to be a shareholder in the company in respect of the shares so forfeited, and such shares and all benefit or emolument arising therefrom should vest in and become the property of the company absolutely. Provided that no such forfeiture should be declared until seven days' notice of the intention of the directors to forfeit such shares should be given to the defaulting shareholder, by advertisement, to be inserted in three consecutive issues of one of the daily newspapers published in Sandhurst.

On the 14th of January, 1867, a general meeting of shareholders which had been duly convened and at which the respondent was present, was held.

At that meeting Messrs. Ladams, Bruce, Ashley, Hunter and Fernley were duly elected directors, Ashley, Hunter and Fernley being the three who received the lowest number of votes.

Assuming rule 17 to be valid, notwithstanding sect. 39 of Act No. 228 expressly authorized the shareholders to make rules for the *annual retirement* of directors, and not for the quarterly retirement of some of them, Ashley, Hunter and Fernley ought to have retired at the next general quarterly meeting of shareholders held on the 11th of April, 1867. At that meeting, however, no retirement in express terms took place. All that is recorded is that Messrs. Hunter and

McLevy were then nominated as directors, and no other candidates being proposed, were declared *duly elected for the next six months*. Nothing is recorded as to Ashley's having retired and been re-elected, but it was contended in argument that as no other candidates than Hunter and McLevy were proposed, it is to be assumed that Ashley virtually retired and was re-elected.

*It is not very important, in the view which their [50 Lordships take of the case, whether Ashley legally continued to be a director after that meeting or not.

It was held by the full bench of the Supreme Court that the company could not, under the provisions of sect. 39, Act No. 228, legally make a rule for the continuance of directors in office beyond the period of a year, as the act required an annual retirement. Mr. Justice Molesworth, however, appears to have entertained a different opinion in the case of rules made before incorporation. He says :

"A question arose under sect. 39, Act 228, in *Barfold Estate Gold Mining Company v. Klingender* (¹), as to the power of a company by rules before incorporation to enable their directors to hold office until their successors were appointed, although that time might exceed a year, and the court, having regard to the words of the section, 'rules for the election, removal, and annual retirement of some or all of the directors,' held that there was no such power. As to the Garden Gully Company, its rules were assented to before incorporation, and a reference to its rules was contained in the application for registration, so that, according to my opinion, a rule for the continuance of directors to hold office for more than a year, if no successors were appointed, would be valid ; but I should consider myself bound by the case of *Barfold Estate v. Klingender*. It is unnecessary to discuss the points in which the full court differed from me as to the construction of the rules of the Garden Gully Company in *Schmidt v. Garden Gully Company* (²). Upon the following points we were agreed, that there must be properly appointed directors to make a call, and also to declare a forfeiture, and also that the election of five directors, a full board, at a quarterly meeting, April 14, 1869, was invalid under the rules. The rules contained no provision for their electing five ; and I would say that those, if any, who legally held office before that election, taking as under the election, could not be deemed to act under their former title, but the full court said, as to the argument, that it was competent to any general meeting to elect a full board if

(¹) 6 W. W. & A'B., 28.

(²) 4 Australian Jurist, pp. 63, 137.

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there was no board in existence: ‘We do not mean to say 51] that the general meeting in question could not *have elected a full board if proper notice had been given of the intention to do so.’ Now in this case there is evidence which was not in *Schmidt’s Case*, that an advertisement was inserted in the Bendigo Advertiser, 8th, 10th and 13th April, that the half-yearly general meeting of shareholders would be held at the office on the 14th, for the purpose of receiving report and balance sheet, electing a full board of directors, and for general business, and it has been argued that this might be a proper notice according to the view of the full court. I think that where all directors *de facto* are not legally appointed, there must be necessarily some way for a company to supply the defect, and that I think might be an extraordinary meeting convened under Act 228, sect. 23, that is, by fourteen days’ notice, advertised in town and country newspapers, or by a quarterly meeting regularly convened, and having express notice of the object under the 8th rule of the company, which requires the giving of due notice under Act 228, that is, the same as is provided for an extraordinary meeting under it.”

If the decision of the full bench in the *Barfold Estate Case* was correct, the five directors appointed in January, 1867, ceased to exist in January, 1868, in which month they ought to have retired, and a new election to have taken place. But assuming, without expressing any opinion upon the subject, that rule 17 was valid, and that the company had power to provide for the retirement of some of the directors at the general meetings to be held in April and October respectively, and to declare that in the event of any general meetings not being held, the directors who ought to have retired at such meeting should continue in office, and in all respects be considered as re-elected; assuming, also, that by virtue of what took place at the meeting of the 11th of April, 1867, Messrs. Ladams, Bruce, Ashley, Hunter and McLevy then constituted a legal board of directors, the question is, Did Messrs. Hunter, Bruce and Ashley, who declared the forfeiture at the meeting held on the 18th of June, 1869, at that time constitute a valid board?

Of those three, Hunter, it must be borne in mind, had been elected at the meeting of the 11th of April, 1867, expressly “*for the next six months*,” and Ashley had continued 52] to act as director, *as already pointed out, without having expressly retired or been re-elected at the meeting of the 11th of April, 1867.

No general meeting was held between the 11th of April, 1867, and the 14th of April, 1869. On the 8th, 10th and 13th days of April, 1869, an advertisement was published in the Bendigo Advertiser, stating that the half-yearly general meeting of shareholders would be held on Wednesday, the 14th of April, 1869, *for the purpose of electing a full board of directors*, and for general business; and at that meeting a full board, consisting of Messrs. Bruce, Glover, Hunter, Ashley and Wormald were elected.

The entry is as follows :

“Company’s Office, 14th April, 1869.

“General Meeting of Shareholders.

“Present: Mr. Bruce in the chair, Messrs. Hunter, Ashley, Fernley, Philippi, Pay, Saunders and Schumacher.

“The minutes of meetings of 14th January, 1867, 11th April, 1867, and of special meeting of 23d October, 1868, were read, and on the motion of Mr. Hunter, seconded by Mr. Ashley, were confirmed.

“The meeting then proceeded to the election of a full board of directors, when the following gentlemen were nominated: Messrs. Bruce, Glover, Hunter, Ashley and Wormald.

“There being no other candidate, it was moved by Mr. Connelly, seconded by Mr. Schumacher, that the above-named gentlemen be appointed directors. Carried.

“The chairman then declared Messrs. Bruce, Glover, Hunter, Ashley and Wormald duly elected directors of the company.

“Moved by Mr. Connelly, seconded by Mr. Schumacher, that the matter of forfeiture of shares be left in the hands of the directors to do as they may think fit. Carried.

“That resolution was confirmed on the 14th October, 1869.”

It is clear that, according to rule 17, the election of a fresh board of directors was not the proper or ordinary business to be held at the general quarterly meetings in April or October. That was the proper business for the general meetings in January and July. The proper business for the April and October meetings was the retirement of the three directors who received the *lowest number [53 of votes at the January and July meetings respectively, and the election of others in their place. If the five persons who were directors on the 11th of April, 1867, are to be deemed to have been re-elected prior to the meeting of the 14th of April, 1869, they must, according to rule 17, be deemed to have been re-elected at a general meeting in January, 1869, for they

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ought to have retired at that meeting if it had been held ; and in that case, if they had been re-elected, the three who had received the lowest number of votes (and which were those three it is impossible to say) ought to have retired at the meeting of the 14th of April, 1869.

It would be a strong measure under any circumstances to hold that Hunter, who in April, 1867, was in express terms elected for *six months only*, continued in office for two years. But the advertisement for the meeting in April, 1869, was express that the meeting would be held *for the election of a full board of directors*, and at that meeting a full board was elected.

Their Lordships cannot treat the proceedings at the meeting of the 14th of April, 1869, as having any other operation than that of an election of a full board of five directors. They concur in the opinion expressed by Mr. Justice Molesworth, that those, if any, of the five directors who before that election legally held office, could not, after that election, act under their former title. The election of a full board necessarily involved the retirement of those, if any, who, up to that time, legally held the office of director.

If the meeting of the 14th of April, 1869, is to be considered as an extraordinary meeting, fourteen days' notice of the meeting, and of the nature of the business to be transacted at it was necessary, and ought to have been published according to the provisions of section 23 of Act No. 228. If it is to be considered as the quarterly general meeting directed by rule 8 to be held in the month of April, a similar notice was necessary under the provisions of that rule and of section 23, Act No. 228 above quoted, especially as the business of electing a full board of directors was not any part of the business of a meeting held in the month of April.

In any view, the meeting of the 14th of April, 1869, was held without due notice of the meeting and of the business to be transacted thereat ; and their Lordships are of opinion that the election of a full board of directors at that meeting, 54] upon which the *defendants relied in their answer, was invalid, and that the persons so elected had no power to declare a forfeiture. The forfeiture of the 18th of June, 1869, was consequently invalid, whether rule 17 was a valid rule or not ; for if it was invalid, Hunter, Bruce and Ashley ceased to be directors after one year from the date of their appointments. Such forfeiture was, therefore, properly declared void by the decree of the 8th of October, 1874, from which this appeal is preferred.

It was contended at the bar, on behalf of the appellants,

that the Colonial Act, No. 354, passed on the 29th of December, 1869, rendered all forfeitures valid. The object of that act was to authorize any company, registered under Act No. 228, to make rules in the manner pointed out by the 39th section, for the forfeiture of shares, and to declare that any such company should be deemed to have had such power. Section 2 rendered valid all forfeitures of shares made in conformity with such rules which would have been valid if the company at the time of declaring such forfeitures had had the power under any rules of declaring forfeitures; and section 4 expressly enacted that nothing theretofore contained should be deemed to confer upon any person any right or remedy which he would not have possessed, if the power to make rules for the forfeiture of shares had been contained in the said first-mentioned act.

It is perfectly clear that a declaration of forfeiture invalid under the rules of the company was not rendered valid by the act.

It was further contended that, by virtue of rule 10, the resolution passed at the meeting of directors of the 18th of June, 1869, by which the shares were declared forfeited, could not be impeached upon any ground; but that rule applied to meetings of shareholders, and not to meetings of the directors, or to resolutions passed at a meeting of directors; and it is evident that such rule could not have been and was not intended to extend to resolutions passed at invalid meetings, or to resolutions which were *ultra vires*. If it could by possibility apply to such meetings, it would itself be *ultra vires* as enabling the directors to violate the provisions of Act No. 228.

The case was argued very elaborately and with great ability on both sides. Two points were raised on behalf of the appellants *which do not appear to have been even [55 suggested in the court below. They were certainly not set up by the answer, or even adverted to by the court in the judgment or in the decree.

They are, 1st, that the plaintiff's shares were forfeited by a resolution of a board of directors on the 23d of August, 1867.

2dly. That the conduct of the plaintiff amounted to a waiver or abandonment of his shares, and precluded him from contending that they had not been forfeited, or that he continued to be the proprietor of them.

It appears that on the 26th of July, 1867, an extraordinary meeting of shareholders was advertised for the purpose, amongst other things, of considering what action was best

to be taken with defaulting shareholders; that on the 16th of August in that year an extraordinary meeting was held, at which the plaintiff was present by proxy, and that it was there proposed and carried unanimously that the directors should be, and were thereby empowered to forfeit any shares on which calls were owing within fourteen days from that date, if they should deem the same advisable; and that at a meeting of directors held on the 23d of August, 1867, it was proposed and carried that, in accordance with the resolution passed at the meeting of the 16th of August, the shares of the plaintiff and of certain other specified shareholders should be and were thereby declared forfeited for non-payment of calls, and that their interest in the company should cease. It was contended on behalf of the plaintiff that, as by rule 30, it was provided that no forfeiture should be declared until seven days' notice should have been given to the defaulting shareholder by advertisement to be published, as therein mentioned, of the intention of the directors to forfeit such shares, an advertisement of the intention to forfeit the shares ought to have been issued before the forfeiture was declared: on the other hand, the defendants contended that no such advertisement was necessary, at least so far as the plaintiff's shares were concerned, inasmuch as he was present by proxy at the meeting at which power was given to the directors. It is clear, however, that the meeting neither gave nor intended to give power to the directors to forfeit shares in a manner contrary to the express provisions of the rules, and that the meeting had no power to do so. It was not the intention of the plaintiff, voting by 56] proxy, or of the other shareholders present, *that the plaintiff's shares, or those of any other shareholders present, should be forfeited in a manner different from that which would be binding upon other shareholders who were not present; and their Lordships are of opinion that, notwithstanding the resolution passed at the meeting of the 16th of August, every shareholder, including those present at that meeting, was entitled under rule 30 to seven days' notice to enable him to pay his calls before a forfeiture of his shares could be declared; and that the forfeiture declared on the 23d of August, 1867, was invalid.

As to the second point, it appears that at a meeting, held on the 21st of May, 1869, at which Messrs. Hunter, Bruce, Ashley and Wormald were present and acted as directors, and upon whose, or some of whose, proceedings the appellants relied, both in their answer and at the hearing in the court below, it was stated by the manager that the forfeit-

ure of the shares already made, alluding to the forfeiture of the 23d of August, 1867, was not legal, inasmuch as the clause in the company's deed requiring the shares to be advertised had not been complied with, whereupon it was moved and carried that the manager should be instructed to advertise the forfeiture of all shares on which the shilling call (that is the fifth call) had not been paid, unless the same and all back calls should be paid within twelve days from the date of the advertisement; that an advertisement was accordingly published on the 28th, 29th and 30th of May, 1869, stating that, amongst others, the plaintiff's shares would be forfeited, unless the calls were paid within twelve days from that date.

It is clear that as late as the 30th of May, 1869, it was considered by the manager and by a board of persons acting as directors, upon whose acts the company rested their case, that the plaintiff's shares had not been legally forfeited, and that twelve days were given him to pay his calls. Up to that time, therefore, he cannot be treated by the appellants as having abandoned his shares, or as having done anything to preclude himself from contending that they had not been forfeited, and that he was not the legal proprietor of them.

There is no evidence sufficient to induce their Lordships to hold that the conduct of the plaintiff did amount to an abandonment of his shares, or of his interest therein, or estop him from averring that he continued to be the proprietor of them. There certainly *is no evidence to [57 justify such a conclusion with regard to his conduct subsequent to the advertisement of the 30th of May, 1869. In this case, as in that of *Prendergast v. Turton* (*), the plaintiff's interest was executed. In other words, he had a legal interest in his shares, and did not require a declaration of trust or the assistance of a court of equity to create in him an interest in them. Mere laches would not, therefore, disentitle him to equitable relief: *Clark and Chapman v. Hart* (*). It was upon the ground of abandonment, and not upon that of mere laches, that *Prendergast v. Turton* (*) was decided. In March, 1870, the plaintiff claimed his shares, and tendered the amount of his calls. The delay after that date in filing his bill was not evidence from which a waiver or abandonment of his right can be fairly inferred.

There was some evidence as to statements having been made by the respondent to the effect that he would allow his shares to be forfeited, as he could buy them for less than his calls; that the company might forfeit them, and that he

(*) 1 Y. & C. Ch., 98.

(*) 6 H. L. C., 633.

did not see why they did not, and the like. The respondent denied that he ever made the statements imputed to him. The court below expressed no opinion upon that part of the case; nor was it necessary, as the point of abandonment, or estoppel, was not set up by the answer; nor, so far as it appears, at the hearing in that court. Besides, the conversations in which the plaintiff is alleged to have made those statements were long prior to the 30th of May, 1869, when the advertisement appeared giving the plaintiff twelve days to pay his calls.

Their Lordships are not disposed to hold parties too strictly to their pleadings in the lower courts; but they consider that it would be an act of great injustice to allow defences to be set up in appeal which have not been suggested or alluded to in the pleadings, or called to the attention of the courts below. They do not, therefore, wish it to be understood that by hearing the learned counsel for the appellant, and by expressing an opinion upon points which were not raised in the court below, they would have felt themselves justified in reversing the decision of the court below, if they had considered that the points thus raised constituted a defence to the plaintiff's claim.

58] *Upon the whole, their Lordships are of opinion that the judgment and decree of the Supreme Court were correct; and they will, therefore, humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

Solicitors for the appellant: *Valpy & Chaplin.*

Solicitors for the respondent: *Gamlen & Son.*

As to directors holding over until their successors are lawfully chosen, see 18 Eng. Rep., 287, note; Ang. & Ames' Corp., § 288.

As to *de facto* directors: Angell & Ames' Corp., §§ 287, 288.

An incorporation cannot be bound by the acts of *all* its trustees acting personally nor by the act of a majority of them convened together, unless they are so convened at an authorized official meeting pursuant to a call addressed to *all* the trustees: United, etc., v. Vandusen, 37 Wisc., 54, 59-60.

A minority of the directors of a corporation have no right to adjourn a meeting to a place at a considerable distance: State v. Smith, 48 Verm., 266, 15 Am. Law Reg., N. S., 466.

The by-laws of a corporation having nine directors, established certain days

for regular meetings, and provided that when at such a meeting less than a quorum but three or more directors should be present, they should have power to adjourn to any time prior to the next regular meeting. Held, that five directors or a majority of them, at such an adjourned meeting, may exercise the ordinary corporate powers, although the absentees have no other notice of the meeting than that with which they are chargeable from the by-law: Smith v. Law, 21 N. Y., 296.

See also People v. Batchelor, 22 N. Y., 128; Ang. & Ames' Corp., §§ 501-511; 1 Willcock on Corp., §§ 59-89; Cox's Joint Stock Companies (7th ed.), pp. 132, 218.

In all cases where an act is to be done by a corporate body or a part of a corporate body and the number is definite,

a majority of the whole number is necessary to constitute a legal meeting, although at a legal meeting, where a quorum is present, a majority of those present may act.

Hence a by-law adopted at a meeting of six *ad interim* directors of a National Bank, which had twelve directors before its conversion into a National Bank, is invalid because not adopted by a majority or quorum of the board: *Lockwood v. Mechanics, etc.*, 9 Rhode Island, 308.

In Vermont *by statute* it has been held that a quorum of the directors of a corporation are competent to act within the scope of their powers and to bind the corporation, although the meeting was not regularly called and there was no notice to the other directors: *State v. Smith*, 15 Am. Law Reg., N. S., 466, 48 Verm., 266.

When new stock is issued the old stockholders have a *right* to subscribe therefor in proportion to the amount of the old stock held by them: *State v. Smith*, 15 Am. Law Reg., N. S., 466, 48 Verm., 266; *Ang. & Ames' Corp.*, §§ 554-5.

If a member of a corporation who is also an associate director claims that the other directors, as agents of the

corporation, have exceeded their functions in selling property in derogation of the rights of the corporation, that claim must be seasonably asserted in a manner that will bind the parties to such sale. Acquiescence will confirm the sale; and allowing the consideration to be applied to the use of the corporation, will adopt and ratify it; and the purchaser must be a party to such a proceeding: *State v. Smith*, 48 Verm., 266, 15 Am. Law Reg., N. S., 466.

As to forfeiture of stock, see *Mitchell v. Vermont, etc.*, 47 How. Prac., 218; *Glass v. Hope*, 14 Grant's (U. C.) Chy., 484, affirmed 16 id., 420; *Diven v. Duncan*, 41 Barb., 520; *Graham v. Van Dieman's Land Co.*, 1 Hurl. & Norm., 541, 11 Exchequer, 101; *Westcott v. Minnesota, etc.*, 23 Mich., 145; *Cox's Joint Stock Companies* (7th ed.), p. 23-8, and see Index, tit. "Forfeiture;" *Galbraith v. Cooper*, 8 H. L. Cas., 315; *Abbott's Dig., Corp.*, title "Stock" III; *Ang. & Ames' Corp.*, §§ 356, 549; *Lacey's Dig., Railw. Dec.*, 723; *Redfield on Railways*, tit. "Forfeiture;" *Wordsworth's Joint Stock Companies*; *Small v. Herkimer, etc.*, 2 N. Y., 330; *Mills v. Stewart*, 41 N. Y., 384; *Smith v. Lynn*, 3 Upper Canada Err. and App., 201.

[Law Reports, 1 Appeal Cases, 58.]

J.C. (1), Dec. 7, 8, 1875.

[PRIVY COUNCIL.]

WALTER TURNBULL and Others, Plaintiffs; and THE OWNERS OF THE SHIP "STRATHNAVER," her Cargo and Freight, Defendants.

THE "STRATHNAVER."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF NEW ZEALAND.

Salvage—Towage Services—Arrest of Ship—Demurrage.

In a salvage suit promoted in respect of certain services whereby the defendant's vessel, which at the time such services were rendered was in neither actual nor imminent probable danger, had been safely towed into port:

Held, that such services must be regarded as towage, and not as salvage services. No tender of the amount thereof having been made, such amount could not be recovered in a salvage suit.

The Charlotte (2) approved.

(1) *Present*:—SIR R. J. PHILLIMORE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(2) 3 W. Rob., 68.

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No claim for demurrage or detention of a ship under warrant of arrest issued by the unsuccessful promoters of a salvage suit can be allowed in the absence of *mala fides* or malicious negligence.

The Evangelismos ⁽¹⁾ approved.

THIS was an appeal from two decrees of the 3d of December, 1874, and the 11th of December, 1874, respectively, of 59] the judge *of the Vice-Admiralty Court of New Zealand, in a cause of salvage promoted in that court by the appellants as the owner, master and crew of the steamship Storm Bird against the ship Strathnaver, her cargo and freight, for the recovery of salvage in respect of certain services whereby the ship had been safely towed to the port of Wellington. By the former decree the judge pronounced that under the circumstances appearing in the suit, and which are sufficiently set forth in the judgment of their Lordships, no salvage service had been performed by the appellants; and the respondents not having tendered payment as for towage services the judge refused to decree such payment in this suit to the appellants, whom he condemned in costs, dismissing the ship, cargo, and freight, and the owners thereof respectively, from all further observance of justice in the cause. By the latter decree the said judge pronounced that the respondents (the owners of the ship) were entitled to recover £600 for the demurrage and detention of the ship under the warrant of arrest issued by the appellants in the cause, which warrant had been executed on the 12th of September, 1874.

Dr. Deane, Q.C., and Mr. Webster, for the appellants, contended that the evidence showed the Strathnaver and her cargo to have been in a position of considerable danger, from which they were rescued by the services of the appellants; that such services involved a deviation from her voyage by the Storm Bird, delay, and serious risk, and must be regarded as in the nature of salvage services. Further, that, notwithstanding that no tender had been made by the respondents on account of towage services, yet the appellants were, nevertheless, entitled to a decree at any rate for towage, if the evidence did not establish a right to salvage remuneration. They also contended that the court below had no jurisdiction to decree demurrage to be due from the appellants; and that no such damages were sustained or recoverable.

Mr. Cohen, Q.C., and Mr. E. C. Clarkson, for the respondents, contended that the evidence showed that in whatever

(1) 12 Moo. P. C., 352; Swabey, 378.

peril the Strathnaver had at one time been placed or about to be placed, she had been rescued therefrom by the orders of her own pilot, and before *the Storm Bird came up; [60 that the services solicited were towage services, and the appellants were not in law or in fact engaged as salvors; and the court had no power to decree payment of towage services in a salvage suit, no tender of such payment having been made. They supported the decree as to demurrage.

The cases cited were *The Evangelismos* ('); *Mitchell v. Jenkins* ('); *Davies v. Jenkins* ('). [SIR ROBERT PHILLIMORE referred to *The Harbinger* ('), where a tender of the usual amount for towage services was affirmed in a cause for salvage, the court holding that the services rendered did not amount to salvage services.]

The judgment of their Lordships was delivered by

SIR ROBERT PHILLIMORE: This is an appeal from a decree of the deputy judge of the Vice-Admiralty Court of New Zealand, in a case of salvage promoted by the appellants, the owner, master and crew of the steamship Storm Bird, against the ship Strathnaver, her cargo and freight, for recovery of salvage in respect of certain services rendered to the ship, her cargo and freight.

It is hardly necessary that their Lordships should repeat what they have often had occasion to say with regard to cases of this description, namely, that where facts have been established by oral testimony before the court below, and the court has maturely deliberated, and formed its opinion as to the credence due to the witnesses on the one side and the other, this court rarely interferes with such a finding on the part of the judge, and never unless there has been a manifest miscarriage of justice.

It appears that at about a quarter past eight p.m., on Monday, the 31st of August, last year, the steamship Storm Bird, of 68 tons register, manned by a crew of twelve hands, was coming out of the harbor of Port Nicholson, New Zealand, on a voyage from Wellington to a place called Wanganui, with a cargo and seventy passengers. The Strathnaver was a wooden ship of 1,017 tons, a sailing vessel with a cargo and 391 emigrants. She was entering the harbor at the time the other vessel was going out. The captain of the Storm Bird says: "When abreast of the Steeple *Rock"—the exact position has been much considered [61 in the course of this debate, and is some way up the entrance of the harbor,—"my attention was drawn by the

(1) 12 Moo. P.C., 352; Swabey, 378.

(2) 11 M. & W., 755.

(3) 5 B. & Ad., 594.

(4) 16 Jur., 729.

chief officer to signals, blue lights and rockets, bearing from us S.S.W., coming as from the direction of Chaffer's Passage, and to the S. and W. of Barrett's Reef. I took my glasses and went on the bridge and saw the loom of a large vessel; I likewise saw a green light. Nearing the heads opposite Barrett's Reef; I made it out to be a ship. I was then about 100 yards N. of the Outer Rock. We were on a straight course. The green light of the ship was almost south, about two and a half points before our starboard beam to the S.W. of the Outer Rock. I considered the vessel was running into danger by going into Chaffer's Passage. I burned a blue light; my object was to indicate the position of the safe channel. At the same time I steamed with all haste towards the ship, about eight miles an hour. It was just as we were abreast the Outer Rock, about 150 feet off, that I put on steam and altered course to S. and W. I could not see the green light except when she rolled. I steamed towards her bows." Then he says: "She was inside a line drawn from Pencarron Head to end of the West Ledge Reef, heading towards the old pilot station, about two cables length from the part of the West Ledge nearest to the Outer Rock of Barrett's Reef. He goes on to say, what is admitted, that the wind was very light from the south-east. He then says, when he came up to the bows of the vessel he thought it unsafe to go round her bows; that he steamed under her stern and came up again a second time, and then, when he got astern of the ship, he stopped his engine and called out "port your helm;" that he was barely fifty yards from her stern, and he repeated the words three or four times, "port your helm; steer for the light; you are running on a reef." There is no doubt that when the Storm Bird came up the pilot was on board.

Now it will be proper to refer to the evidence of the pilot of the Strathnaver, and to show what his account of the position of the vessel at this time is. The pilot first gives an account of where he was. He says: "When I first got alongside, she was from half to three-quarters of a mile from the Outer Rock of Barrett's Reef, nearly due south. 62] The red light of Somes Island was open *all the time." A little lower down he says: "I said from the boat 'port your helm,' after that I had been a minute or two alongside. I did not see any reason at that time for being extremely expeditious. The proper course was to get the vessel into the white light. The steamer gained on us, but not much. We pulled our boat four and a half to five knots. We arrived at the ship before the steamer." That

is an undoubted fact in the case. "After I got on deck, I braced the yards up, and set the upper mizen topsail, and loosed the main top-gallant sail. It was sheeted home, but am not positive whether it was hoisted up. When the steamer came the first time she came from the direction of the lighthouse at right angles to us, and as she passed I heard Captain Doile singing out 'port.' I recognized his voice. I said, 'all right.'"

Now their Lordships are of opinion upon an examination of the evidence with regard to the situation of the Strathnaver, that at this time it is clear that she was not heading up channel as she ought to have been, but, owing to the ignorance of the captain as to the chart, she was crossing the mouths of both the channels, so to speak, and she was to the south of the Outer Rock about three-quarters of a mile to the southward. There is no dispute as to the fact that the pilot gave these orders, or that he was on board the vessel before the steamer came up.

It appears to their Lordships that the evidence upon which the learned judge of the court below relied was perfectly credible, that these orders were those which enabled the ship to be rescued from a situation of danger,—or perhaps, to speak more accurately, of running into great danger,—because had she continued her course with the wind as it then was, blowing lightly from the south-east, there is no doubt that she would have run upon the West Ledge; and the first question which is really to be determined in this case, when we are considering whether salvage remuneration is due or whether the service was simply one of towage, is, whose advice or whose order it was that prevented this large ship from running upon the West Ledge Rock? There is no reason to doubt that the captain of the Storm Bird did what he says he did, namely, that he shouted out "port," and that he burned a light by way of a signal. At the same time there is *equally no [63] doubt that the pilot when he came up,—the exact time is difficult to ascertain, the learned judge thinks it was a short time, but it was an appreciable time before the arrival of the Storm Bird,—he gave the order from his boat, being anxious, no doubt, that no time should be lost in order to port the helm, and to brace the yards on the starboard tack. It was the execution of that order which, in the opinion of the court below—and their Lordships on the whole, see no reason to differ from it, and it is also the opinion of the nautical assessor, by whom their Lordships are assisted to-day,—it was the execution of that order which rescued the

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The "Strathnaver."

J.C.

ship from running into the danger which she otherwise would have incurred. Their Lordships therefore cannot ascribe the character of a salvor to the steamer, on the ground that she also gave the advice which has been mentioned.

Now there is no doubt of this fact, that when the steamer did come up again, having crossed the stern of the other ship, and come up again on her port bows, she was engaged to take the vessel in tow, and the question then arises, which has been so much contested in the court below and before their Lordships to-day, whether she may be considered, in construction of law, to have been engaged as salvor, or to have been engaged merely to tow.

Upon this point it may be well to refer to a very clear and precise statement of the law by Dr. Lushington, in the case of *The Princess Alice* (¹), in which he says, "without attempting any definition which may be universally applied, towage services may be described as the employment of one vessel to expedite the voyage of another when nothing more is required than the accelerating her progress." It is contended on behalf of the appellants that something more was required than the acceleration of her progress, and that she was still in danger after the pilot had given the order to port the helm, and to brace the yards on the starboard tack, and to put the head of the vessel exactly in the opposite direction from what it had been, and to direct the course of the vessel eastward instead of north-westward upon the rock.

Now this is a question upon which the learned judge had [64] *a variety of conflicting testimony before him, and after most maturely and carefully deliberating upon it—and, it may be observed, in passing, it would be difficult to conceive a more accurate and careful note than the learned judge seems to have been at the pains of taking—after mature deliberation on the subject, he came to the conclusion that the *Storm Bird* was not engaged as a salvor, but merely to tow the vessel. The facts stand in this way: they are thus described in the evidence of the pilot. He says: "After the steamer passed she stopped. I thought she was going on her course. I had no thought of taking a steamer then. I then had a conversation with the captain"—that is, his own captain—"on the propriety of getting a steamer to tow us, not on account of danger, but on account of expedition." It may be observed, in passing, that this large vessel had a number of emigrants on board, who were naturally extremely anxious to arrive at the port. "I think the master

(¹) 3 W. Rob., 138.

of the steamer might have been deceived as to the position of our ship, because he came out on the bright light and saw the vessel under the red." In the lighthouse at *Somes Island* there are three lights, a green light, a white light, and a red light. The white light is the one which should be followed; it is the safe light leading to the central passage up the main entrance, and which ought to be followed. He goes on to say: "It might have appeared to him she was more to the west than she was. I know the position exactly from pulling from the *Outer Rock* to the ship. The captain hesitated about taking the steamer. I told the captain she belonged to a respectable firm. He asked the name, and I told him. He said they corresponded with his owners or consignees. Something to that effect. I then hailed the steamboat." Now it is important to observe what he says passed. "I said 'Storm Bird, ahoy!' He said, 'What is it?' I said, 'Will you give us a tow?' He said, 'Yes.' I said, 'What will you give us a tow for?' He said, 'Leave that to the agent,' or to that effect. That did not satisfy the captain till I told him about Mr. *Turnbull*. I then said, 'All right, I will give you a tow line.' I said, 'If you will only tow me inside the *Steeple Rock* that will do.' I do not know whether he heard or not."

*Now the evidence establishes both these facts, first, [65 that the pilot proposed to engage him merely to tow the vessel; and, secondly, that the captain of the *Storm Bird* never accepted the proposal as a mere service of towage. Therefore the question must be determined with reference to the necessity of the ship at this time, because the captain not having accepted the offer to tow, if the vessel was in a state of danger at that time, and he had towed her, he would be entitled to be considered as salvor; but it has been already stated that the court below was satisfied that at this time there was no danger to the vessel. Their Lordships think they ought not to disturb this decision, but, inasmuch as the learned judge has used the words "actual danger" very often, although probably it received a restriction in his own mind which was not stated, it may be useful to state what is really the law with respect to services rendered to a vessel in danger or apparent danger, the law is laid down in the case of *The Charlotte* (') by Dr. *Lushington*. He says, "It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute." Their Lordships are of opinion there was neither actual nor imminent probable danger at the time

(') 3 W. Rob., 71.

these services were rendered. The finding of the judge to this effect, no doubt, depended upon his giving preference to the witnesses who were produced on behalf of the respondents over those who were produced on behalf of the appellants. If indeed the judge had been satisfied that what the appellants' witnesses asserted was true, namely, that the pilot said to them, "Will you tow her off this reef?" the case would have assumed a very different aspect, and it might have been fairly urged in that case that what the Storm Bird did was an act of salvage and not an act of towage. But in the circumstances which have been stated, the learned judge came to a different conclusion upon the facts before him, and their Lordships, on the whole, decline to set aside that decision. Therefore, upon that part of the case, their Lordships will humbly recommend Her Majesty to affirm the judgment.

There is another portion of the judgment, by no means 66] *immaterial, to which I must now advert. It appears that the learned judge of the court below was of opinion that he could entertain in this case a claim for demurrage. The property was valuable, and worth in all about £40,000. The action I think had been entered for £12,000. The learned judge upon the whole thought he was justified in decreeing to the respondents damage to the amount of £800 in the shape of demurrage. Now it is to be observed that the learned judge himself more than once in the course of his judgment expressed his opinion that those on board the Storm Bird, and especially the captain of the Storm Bird, conducted themselves *bona fide* throughout, and he ascribes no misconduct to him of any sort or kind, but simply an error in judgment in bringing the suit. Now their Lordships think that the learned judge was well-founded in that opinion. In this state of things their Lordships are at a loss to understand why any damages at all should have been granted against the appellants. The law upon this was very carefully considered in the decision in the case of *The Evangelismos* (¹), by the very eminent judge who delivered their Lordships' opinion, Mr. Pemberton Leigh. In that case "the collision took place at sea. The vessel causing the damage got away. From the appearance of a vessel in port the owners of the damaged vessel caused her to be arrested to answer an action for damages. The vessel seized was a foreign vessel, and in consequence of the owner having no funds in this country, she was detained for some months before she was released on bail. The plaintiffs failed to

(¹) 12 Moore P. C., 352.

identify the vessel seized as being the one causing the damage, and the Admiralty Court dismissed the action with costs, refusing to award damages." Then there was an appeal to their Lordships, and Mr. Pemberton Leigh in delivering the judgment of their Lordships said: "It is also said that it is the established rule of the Admiralty Court where a party brings an action and succeeds in upholding it, that he is entitled, unless there are circumstances to take it out of the ordinary rule, to have compensation for the loss he has suffered, which in some cases is very inadequate, but it is the only compensation the court can award. Their Lordships think there is no reason for distinguishing *this [67 case or giving damages. Undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia* which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at common law damages may be obtained. In the Court of Admiralty the proceedings are however more convenient, because in the action in which the main question is disposed of, damages may be awarded." Their Lordships came to the conclusion, though the case was certainly a very strong one, inasmuch as the wrong vessel had been seized; that in the absence of proof of *mala fides* or malicious negligence, they ought not to give damages against the parties arresting the ship. It appears to their Lordships that the general principles of law are correctly laid down in that judgment, and it is their intention to adhere to them. They will therefore humbly advise Her Majesty that that part of the learned judge's sentence be reversed.

Their Lordships think that inasmuch as the appellants have succeeded in part of their case, and as they have appealed from the whole judgment, they will follow the rule which they have usually adopted on these occasions, and leave both parties to pay their own costs of the appeal. But their Lordships think the appellants are entitled to have their costs in the court below strictly confined to the costs incident to the decree as to demurrage, and that they must pay the costs of the salvage suit in the court below.

Solicitors for the appellants: *J. & R. Gole.*

Solicitors for the respondents: *Hollams, Son & Coward.*

[Law Reports, 1 Appeal Cases, 120.]

H.L. (E.), Feb. 17, 1876.

[HOUSE OF LORDS.]

120] *ALEXANDER THORN, Plaintiff in Error; and THE MAYOR AND COMMONALTY OF LONDON, Defendants in Error (¹).

Contract—Implied Warranty.

Where plans and a specification, for the execution of a certain work, are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification.

The contractor for the work cannot, therefore, sustain an action for damages, as upon a warranty, should it turn out that he could not execute it according to such plans and specification.

T. contracted with the defendants to take down an old bridge and build a new one. Plans and a specification prepared by the defendants' engineer were furnished to him, and he was required to obey the directions of the engineer. The descriptions given were stated to be "believed to be correct," but were not guaranteed; and, in one particular matter at least, he was warned to make examination for himself. Part of the plan consisted in the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wholly lost, and the bridge had to be built in a different manner. In this way much labor and time were wasted. The contract contained provisions as to the payment for extra work, and that work had (with the contract work) been duly paid for. The contractor sought for compensation for his loss of time and labor occasioned by the failure of the caissons, and in his declaration alleged that the defendants had warranted that the bridge could be inexpensively built according to the plans and specification. There was no express warranty to that effect in the contract:

Held, that none could be implied.

Seemle, that if he had any remedy under these circumstances it was not in an action for damages as for breach of warranty, but for compensation as upon a *quantum meruit*.

On the 5th of March, 1864, Mr. Brand, on behalf of the Bridge House Committee of the City of London, published a notice asking for "tenders for taking down and removing the present bridge at Blackfriars, and erecting a new bridge in lieu thereof." The "plans of the intended new bridge [121] and specification of the works *to be executed," were announced as to be seen at the office of Mr. Joseph Cubitt, the engineer, who was employed by the defendants. The plaintiff and his brother, Mr. Peter Thorn (since deceased), tendered for the work, and their tender was accepted.

Article 30 of the specification declared that the contractors were "to take out their own quantities, no surveyor being authorized to act on the part of the corporation;" article 36 was thus worded: "Drawings lettered A, &c., are

(¹) Affirming 12 Eng. Rep., 555; 9 id., 475.

plans and sections of the existing bridge, and of the works executed thereon. They give all the information possessed respecting the foundations. These plans are believed to be correct, but their accuracy is not guaranteed, and the contractor will not be entitled to charge any extra should the work to be removed prove more than indicated on these drawings." Under the head of "coffer-dams," there was in the specification this article: "54. The contractor must satisfy himself as to the nature of the ground through which the foundations have to be carried; all the information given on this subject is believed to be correct, but is not guaranteed." Under the heading "Iron caissons," the specification contained the following articles: "63. The foundations of the piers will be put in by means of wrought iron caissons, as shown on drawing No. 7." "64. The casing of the lower part of which caissons will be left permanently in the work. The upper part, which is formed of buckle plates, is to be removed. The whole of the interior girder framing must be removed as the building proceeds, the work being made good close up to the underside of each girder before removal thereof." "66. The whole of the iron used in the caissons shall be of good quality, capable of bearing a tensible strain of eighteen tons per square inch. Plates and bars will be selected at random by the engineer, which must be cut to the required form, and submitted to such tests as the engineer may direct." The 77th article declared that "all risk and responsibility involved in the sinking of these caissons will rest with the contractor, and he will be bound to employ divers or other efficient means for removing and overcoming any obstacles or difficulties that may arise in the execution of the works." The 79th article put the control of the quality of the concrete under the direction of the engineer.

Upon the plaintiff's tender being accepted, a deed dated the 24th of May, 1864, was executed. This deed in [122 various parts described the intended works as to be executed to the satisfaction of the engineer. The works (sect. 8) were to be completed, within three years, for the sum (sect. 12) of £269,045, increased by such sum as shall become payable, or, as the case may require, diminished by such sum as shall have to be deducted (as provided in sect. 13) in respect of alterations or variations in the works." Section 13 gave the engineer power "at any time or times, during the progress of the works to vary the dimensions or position of the various parts of the works to be executed under these presents, without the said contractors being entitled to any extra

charge for such alteration, provided the total quantity of work be not increased or diminished thereby." Any alteration should be valued according to the schedule of prices accompanying the deed. And whenever the engineer gave notice of any such alteration or variation the contractors were to execute the work according to his directions. For delays caused by the contractors £1,000 a month were to be deducted from the contract sum. By sect. 22 it was provided that in case the contractors should refuse or neglect to perform the works "as in the aforesaid specification directed or mentioned, or as shown on any of the said drawings, or to obey and comply with any order or direction to be given by the engineer," the works might be taken out of the hands of the contractors.

The work was begun in June, 1864, and neither the Bridge House Committee nor the mayor and commonalty ever, in any way, interfered with its progress. But after the caissons prepared as directed had been used, it was found that they would not answer their purpose, and the plan of the work was altered. Time was thus lost, and the labor which had been given to the execution of the original plans was wasted. It was admitted that the work done under the contract had been well done, and the contract price was duly paid, and the costs of the extra work rendered necessary by alterations had been paid. But the contractor claimed compensation for loss of time and labor occasioned by the attempt to execute the original plans. This was refused, and this action was brought. In the declaration it was alleged that "the defendants guaranteed and warranted to the plaintiff that Blackfriars bridge could be built according [23] to certain plans and a specification *then shown by the defendants to the plaintiff, without tidework, and in a manner comparatively inexpensive, and that certain caissons shown on the said plans would resist the pressure of water during the construction of the said bridge, whereby the plaintiff was induced to contract with the defendants for a certain sum of money, far less than he otherwise would have done;" and then the declaration went on to allege the failure of the plans and specification and of the caissons, whereby he was obliged to expend large sums of money in endeavoring to build the bridge according to such plans, and in afterwards completing the bridge; and he lost all the profits he otherwise would have realized in building the same.

The cause of the failure was that the caissons would not resist the external pressure of the water, so that the piers of

the bridge had to be built independently of them, and much of the preceding work was wasted, and the piers were built as the tide permitted the work to go on, which occasioned great delay.

The facts were turned into a special case for the opinion of the Court of Exchequer. The case was argued in May, 1874, and the Lord Chief Baron, Mr. Baron Pigott, and Mr. Baron Amphlett, gave judgment for the defendants on the ground that there was no implied warranty in the contract (*). On error, this judgment was affirmed in the Exchequer Chamber (*). Error was then brought to this House.

Mr. *Benjamin*, Q.C., and Mr. *H. M. Bompas* (Mr. *Littler*, Q.C., and Mr. *J. W. Batten*, were with them), for the plaintiff in error: If a man enters into a contract by which he binds another to do certain work for him at a certain place, he impliedly undertakes that the place shall be free and fit for the work to be done there. So, if he stipulates that the work shall be done in a certain manner, he undertakes that it can be done in that manner. And this is especially so if he appoints his own servant to see that it is done in that manner, and, by his contract for the work, binds the workman to follow the directions of that servant. All this occurred *in the present case. The plans and speci- [124] cation were prepared by the engineer of the defendants. The plaintiff was required to work according to those plans and specification, and was put under the direction of the engineer; he acted under that direction; he did the work according to the plans and specification. It was admitted that he did the work well, but it failed, and had to be altered because the plans and specification were erroneous. Nothing could be more in accordance with justice than that the workman whose time and labor had been thus wasted, and wasted not by his own fault but by the mistakes of the person whose directions he was bound to obey, should be compensated for the loss he had thereby suffered. He was to be punished by a heavy penalty for any delay occasioned by himself; he was equally entitled to be compensated if delay was occasioned by the act or default of others. This principle of implied liability arising from the nature of the circumstances was adopted in *Knight v. Gravesend, &c., Waterworks Company* (*); and that case ought to be followed here. The specification formed part of the contract, for one of the recitals of the contract, after mentioning its preparation by Cubitt, said, "It includes the general conditions of and in relation to the works." And the various

(*) Law Rep., 9 Ex., 163.

(*) Law Rep., 10 Ex., 112.

(*) 2 H. & N., 6.

clauses in the contract which submitted the acts of the contractor to the direction of the engineer, all showed that the contractor was not like a mere independent workman who had undertaken to perform a certain work, and was responsible for the manner of doing it, and was left to perform it in his own way, but was like a person bound to do the work in a certain form, and in no other, and to do it in that form under the directions of a particular officer. If that form led to failure, he ought not to suffer for the failure. The responsibility lay with those whose fault occasioned it. The only instance in which the contractor was required to use his own knowledge and discretion was to be found in the 54th article of the specification, but the fact that he was there required to satisfy himself as to the nature of the ground through which the foundations were to be carried showed that, as to all other matters, the defendants took on [25] themselves the responsibility of the business. *Now the failure here had not been occasioned in any way through neglect as to that article, but arose entirely from the mistake of the engineer as to the strength and use of the caissons. *Roberts v. Bury Improvement Commissioners* (¹) was in favor of the appellant. It had at first been decided the other way, but that was because it had been deemed there that the words of the contract gave final authority to the architect to decide on the matter, and such had been the opinion of the two dissenting judges in the Exchequer Chamber(²). The majority of that court however overruled the first decision, on the ground that the rule of law which exonerates one of two contracting parties from the performance of a contract, applied where the performance of it is prevented or rendered impossible by the act of the other party. And nobody doubted that, but for the matter of the supposed finality of the architect's determination, the commissioners would from the first have been liable, for the fault had arisen not from the act of the contractor, but from that of the commissioners. Here the fault was altogether that of the defendants' engineer; and the plaintiff must not suffer on that account. *Hill v. Corporation of London* (³) was a case where the contractor was held entitled because the land on which he was to build had not been given to him, and his performance of his contract was therefore rendered impossible. So here, the caissons were not merely unfit for the work, but were the occasion of mischief, and the work which had been performed was wholly wasted. But that was the fault of the engineer, not of the plaintiff;

(¹) Law Rep., 4 C. P., 755.

(²) Law Rep., 5 C. P., 310.

(³) Not reported.

and for the fault of their engineer the defendants were responsible. *Appleby v. Myers* ⁽¹⁾ was not adverse to the plaintiff, for there the contract itself had made the price payable only on the completion of the work, and as the work had not been completed, no part of the price could be demanded. Here there was no such restraining stipulation. The work had been done, and well done. It had been done under the direction of the engineer, and what was defective was entirely occasioned by his plans, which the plaintiff was bound to follow. For the loss which had been occasioned by following them, the plaintiff was entitled to be compensated.

*Sir *H. Giffard*, S.G., and Mr. *Thesiger*, Q.C., for [126 the defendants were not called upon.

THE LORD CHANCELLOR (Lord Cairns): My Lords, nothing could be more ingenious and able than the two arguments which your Lordships have heard from Mr. Benjamin and Mr. Bompas in support of the case of the appellant. But, my Lords, those arguments, ingenious and able as they were, have certainly not occasioned any doubt in my mind, and I think they have not occasioned any doubt in the mind of any of your Lordships, as to the soundness of the decision, the unanimous decision, of the two courts from which this appeal has been brought.

My Lords, the action which was brought by the appellant in this case was upon a cause stated in his declaration, very shortly in these words: [His Lordship read the declaration, see *ante*, p. 122.]

The action so commenced was, by an order of the learned judge, ordered to be turned into a special case without pleadings, and we must go to the special case to find what is the question put, and what is the ground of action submitted for decision to the court. "The question" on the special case "for the opinion of the court is, whether there is any and (if any) what implied warranty on the part of the defendants, to the effect stated in the declaration, or so as to give to the plaintiff a cause of action against the defendants. If the court should be of opinion that such warranty exists, and that on the facts the plaintiff has a cause of action, then judgment is to be entered for the plaintiff." "If the court should be of a contrary opinion, then judgment to be entered for the defendants." Therefore, my Lords, the action whether you look to the declaration or to the special case, is an action founded upon a warranty; and the question for

⁽¹⁾ Law Rep., 1 C. P., 615; 2 C. P., 651.

the opinion of the court is, whether such a warranty exists, either by expression or by implication.

I do not propose to go at any length into the narrative of the facts of this case which has been so completely and so recently put before you. Blackfriars bridge was to be rebuilt. The defendants, who constitute the corporation of London, called for tenders for rebuilding the bridge. They had, of course, to indicate in what way they desired the work to be constructed, and, as is usual in such cases, specifications and drawings were prepared by their engineer, *Mr. Cubitt, to be the subject of tender. Mr. Cubitt considered that the bridge could be built in a manner which was somewhat, if not altogether, novel, by the use of caissons in the place of coffer-dams, and the specification and drawings were prepared on that footing. The contract referred to the specification, and, for the purpose of what I have to say, I will assume that the specification must be read into the contract. The specification provided, as is usual in cases of the kind, with regard to extra or varied work, that extra or varied work should be certified and accounted for, and paid for at certain specification prices. The plaintiff in this case (the appellant) says that when he came to perform the work the upper part of the caissons, inside of which the pier was to be built, was found, if constructed, as it was constructed, according to this specification, to be unable in point of strength to stand the pressure and the force of the stream; that therefore the upper part of the caisson had to be abandoned, the lower part remained in the river, and the lower part of the pier was built inside the lower part of the caisson up to low-water mark; that, in consequence of its becoming necessary to abandon the upper part of the caisson in place of building inside the caisson above low-water mark, the work had to be done between low and high water, when it could be done without the impediment of the river at that height—and that that occasioned, as it obviously would, great delay in point of time, and considerably more expense in point of outlay.

My Lords, it appears to me, that under those circumstances, the appellant must necessarily be in this dilemma, either the additional and varied work which was thus occasioned is the kind of additional and varied work contemplated by the contract, or it is not. If it is the kind of additional or varied work contemplated by the contract, he must be paid for it, and will be paid for it, according to the prices regulated by the contract. If, on the other hand, it was additional or varied work, so peculiar, so unexpected, and so

different from what any person reckoned or calculated upon, that it is not within the contract at all ; then, it appears to me, one of two courses might have been open to him ; he might have said : I entirely refuse to go on with the contract—*Non hæc in fœdera veni* : I never intended to construct this work *upon this new and unexpected footing. Or he might [128 have said, I will go on with this, but this is not the kind of extra work contemplated by the contract, and if I do it, I must be paid a *quantum meruit* for it. Or, for aught I know, for I wish to express no opinion upon the subject, having gone on with it, he might now, if this is not extra work within the contract, have maintained a proceeding for remuneration upon a *quantum meruit* for the extra work he so did. I repeat, I give no opinion whatever upon that point ; but it appears to me that those courses were the only courses open to him. But that which he comes here for now is not remuneration under the contract at all ; it is neither remuneration fixed by the engineer, nor remuneration on a *quantum meruit*. It is a proceeding, first, according to the declaration, then in the words of the special case, upon a warranty, and for damages as for a breach of the warranty.

Now, my Lords, I own that that raises, as it appears to me, a very serious and a very alarming question, if it were to be entertained, or if it should be held that upon such a footing the appellant could succeed. The proposition which would be affirmed would not go merely to the present case, but would go to nearly every kind of work in which a contractor is employed, and in which, for convenience, specifications of the details of the work are issued by the person who desires to employ the contractor. In those specifications, and in the contracts founded upon them, an elasticity or latitude is always given by provisions for extra additional and expected work ; but if it were to be held that there is, with regard to the specification itself, an implied warranty on the part of the person who invites tenders for the contract, that the work can be done in the way and under the conditions mentioned in the specification, so that he is to be liable in damages if it is found that it cannot be so done, the consequences, I say, my Lords, would be most alarming. They would be consequences which would go to every person who, having employed an architect to prepare a plan for a house, afterwards enters into a contract to have the house built according to that plan. They would go to every case in which any work was invited to be done according to a specification, however unexpected might be the results from that work when it came actually to be executed.

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129] *My Lords, it is not contended that there is any express warranty whatever on the face of any of the documents in this case. The question may readily be asked, Is it natural to suppose that any warranty can have been intended or implied between these parties? Is it natural to suppose, can it be supposed for a moment, that the defendants intended to imply any such warranty? My Lords, if the contractor in this case had gone to the bridge committee, then engaged in superintending the work, and had said: You want Blackfriars bridge to be rebuilt; you have got specifications prepared by Mr. Cubitt; you ask me to tender for the contract; will you engage and warrant to me that the bridge can be built by caissons in this way which Mr. Cubitt thinks feasible, but which I have never seen before put in practice. What would the committee have answered? Can any person for a moment entertain any reasonable doubt as to the answer he would have received? He would have been told: You know Mr. Cubitt as well as we do; we, like you, rely on him—we must rely on him; we do not warrant Mr. Cubitt or his plans; you are as able to judge as we are whether his plans can be carried into effect or not; if you like to rely on them, well and good; if you do not, you can either have them tested by an engineer of your own, or you need not undertake the work; others will do it.

My Lords, it is really contrary to every kind of probability to suppose that any warranty could have been intended or implied between the parties; and if there is no express warranty, your Lordships cannot imply a warranty, unless from the circumstances of the work some warranty must have been necessary, which clearly is not the case here, or, unless the probability is so strong that the parties intended a warranty, that you cannot resist the application of the doctrine of implied warranty.

Now, my Lords, that appears to me to exhaust the whole of this case. If this contractor is entitled to remuneration for the services he performed, it must be sought, or ought to have been sought, in a way different from the present. Damages as for a breach of warranty he is, in my opinion, in no respect entitled to; and therefore I move your Lordships that the judgment of the court below be affirmed, and the appeal dismissed with costs.

130] *LORD CHELMSFORD: My Lords, the question which alone is open to the appellant on the special case is, whether the defendants are liable to him upon a warranty either in the terms stated in the declaration, or to give him a cause of action. The case of the appellant is not that there was any

express warranty, but that, from the facts and circumstances of the case, a warranty by the defendants to the effect stated in the declaration must be implied.

The contract entered into between the appellant and the defendants originated in an advertisement issued by the corporation inviting tenders for the rebuilding of Blackfriars bridge according to certain plans and specifications, which it was stated might be seen, and farther particulars obtained at the office of Mr. Cubitt, the engineer for the corporation. It appears that the ordinary mode of proceeding to lay the foundations and build the piers of a bridge is, by the construction of timber coffer-dams which exclude the tidal water and enable the work to be continued uninterruptedly in every state of the tide. By this specification, instead of coffer-dams, the foundations of the piers are to be laid by means of iron caissons, and minute details are given of the quantity of iron to be used in the caissons, the form and dimension of the iron work, and the means of making them water-tight.

The plaintiff's tender for the work having been accepted, he executed a deed by which he agreed to perform, under the superintendence and according to the directions of the engineer, all the works of every description which should be required to be made, done, and executed, in building the new bridge, including all piers, &c., according to the specification and drawings. The caissons were found not to be of sufficient strength to resist the pressure of the water, and it became necessary to make great alterations in them, which brought them considerably below high-water mark, and the piers could then only be completed by tide work. This occasioned great delay in the execution of the whole work, and the appellant sustained in consequence great loss and damage, which he alleges that, upon the facts of the case, the defendants must be taken to have warranted him against.

I think the difference of opinion between two of the judges as to whether the caissons are to be considered as work to be done, *or as the mode of performing the work, like [13] the scaffolding necessary for the building of a house, is quite immaterial. The plaintiff, by his contract, bound himself to execute the works of every description which should be required in building the new bridge, including the piers, according to the specification. Therefore in whatever light the caissons are to be regarded, the appellant was bound to employ them in the construction of the piers.

It is stated in the special case that, "The difficulties in

carrying out the work in accordance with the plans and designs of the engineer of the corporation, in the several respects before-mentioned, were not known by the contractors at the time of entering into the said contract, although the same might have been discovered on careful examination of the specification and drawings by a civil engineer of competent skill and knowledge. The contractors had in their employment, before and at the time of tendering for the contract, a civil engineer who saw the plans, but no such careful examination had, in fact, been made by him or by any other person on behalf of the contractors.'

This passage Mr. Benjamin ingeniously turns against the engineer of the defendants, and urges it as proof that he could not have made a careful examination before he devised the new plan for the construction of the piers and prepared the specification. And he argued that, the engineer being originally in fault, no objection lay against the plaintiff on the ground of contributory negligence. It is unnecessary to consider the validity of this argument, but assuming that there was a want of care and skill on the part of the engineer, how does the act of the defendants in issuing the advertisement inviting tenders for the work according to the specification, and referring to the engineer for farther particulars, imply a warranty that the work was capable of being carried out upon the terms and under the conditions contained in the specifications.

But it is argued on behalf of the plaintiff that from the contract itself a warranty may be implied on the part of the defendants, that there are several clauses in which the defendants expressly state they will not guarantee certain things, and that, upon the maxim *Expressio unius est exclusio alterius*, there is an implied warranty in every case [32] which is not expressly excluded. This is *certainly a novel application, if not a total change of the purpose of the maxim, for the plaintiff's argument really is, that *Exclusio unius est expressio alterius*, that the exclusion of a warranty as to certain parts of the contract is an admission of a warranty as to the other parts. There is no principle upon which such a rule of law could exist; and certainly nothing approaching to it has ever been established.

There can be no doubt that the plaintiff, in the exercise of common prudence, before he made his tender, ought to have informed himself of all the particulars connected with the work, and especially as to the practicability of executing every part of the work contained in the specification, according to the specified terms and conditions. It is said

that it would be very inconvenient to require an intended contractor to make himself thoroughly acquainted with the specification, as it would be necessary upon each occasion for him to have an engineer by his side. Such an imagined inconvenience is inapplicable in this case, as it appears that the plaintiff had his engineer, who examined the specification for him, though not carefully. But if the contractor ought prudently and properly to have full information of the nature of the work he is preparing to undertake, and the advice of a skilful person is necessary to enable him to understand the specification, is it any reason for not employing such a person that it would add to the expense of the contractor before making his tender? It is also said that it is the usage of contractors to rely on the specification, and not to examine it particularly for themselves. If so, it is an usage of blind confidence of the most unreasonable description.

The appellant having entered into the contract with the neglect of all proper precautions, and trusting solely to the specification in a case in which the proposed substitution of iron caissons for coffer-dams was an entire novelty, and the progress of the work having disclosed the inefficiency of the plan of working described in the specification, which he might by careful examination have discovered beforehand, he endeavors to throw upon the defendants the consequences of his own neglect to inform himself of the nature of the work he was preparing to undertake, by alleging that there was an implied warranty by them that the *bridge [133 could be built according to the plans and specification, and that the caissons shown on the plans would answer the purpose of excluding the tidal water during the construction of the bridge.

If the plaintiff had considered, as he was bound to do, the terms of the specification, he would either have abstained from tendering for the work, or he would have asked the defendants to protect him from the loss he was likely to sustain if the plan of working described in the specification should turn out to be an improper one. It is unnecessary to speculate upon what the answer would have been to such an application. But I think we may fairly assume that if the defendants had been asked for an express warranty to the effect alleged in the declaration, they would have refused to give it.

I cannot see any principle upon which, from the facts of the case, an implied warranty can be imported into the contract making the defendants liable for the loss which the

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contractor has sustained by the delay caused by the insufficiency of the caissons to stand the work for which they were intended. I agree that the judgment should be affirmed.

LORD HATHERLEY: My Lords, I entertain the same opinion as that expressed by my noble and learned friends, and after what has been said it is only necessary for me, inasmuch as different grounds have, to a certain extent, been relied on by the judges in the court below, to state on what grounds it appears to me to be absolutely necessary that the conclusion must be arrived at, by your Lordships, which was arrived at by the whole body of the judges when the case was before them.

My Lords, I put it exactly on those grounds upon which my noble and learned friend on the woolsack has put it, that the plaintiff here is placed in this extreme difficulty. It is not only that he comes here upon a case in which the proposition he contends for is not found to be supported by any authority at all, but he is inevitably in the dilemma of being obliged to say one of two things, each of which is adverse to him. He may either say: This work which I have [34] done and for which I now claim to be *paid either by way of damages (that is the mode, and the only mode in which it was put by the case originally brought before the court), or if not by way of damages, then by way of a *quantum meruit* as within the contract; or he may say that it was not within the contract. On the one hand, if it was within the contract, then of course it would be paid for in the manner provided by the terms of the contract, which are full and explicit as to all the work done in pursuance, (I agree with Mr. Bompas in his able argument on this point), and only done in pursuance, of the engagement entered into. He must be paid for it, as it is provided that all such works are to be paid for, namely, upon the amount of extras, that is to say, upon the additional work over and above the amount of work agreed to be executed under the contract. Then, of course, he would have no difficulty in obtaining his remedy.

On the other hand, if it was outside the contract, I apprehend his course would be very clear—clear, at all events, in one sense. No doubt contractors find themselves hampered by the very strong provisions which are usually contained in engagements of this kind, but still in point of law the case would have been clear if he had said: This not being within my engagement, I will have nothing to say to this farther work. I have performed (as Mr. Benjamin once

or twice forcibly put it) all the work my contract requires me to do: the contract is fulfilled; it is not a question of deviating from the contract, or of not carrying the work contracted for into effect; the work has been carried into effect, and now you are calling upon me to do something new; that must be the subject of a wholly new engagement. I will not enter upon the performance of that work until a new contract has been made according to the character and nature of the new work. You have ordered me to do what is outside the contract altogether.

My Lords, in neither of these cases could he recover, because in the one case, if the transaction be within the contract, it is already sufficiently provided for, and he has been paid for it; and in the other case there is nothing to show that he entered into such new engagement at all. All that we have stated to us in the case is, that he was directed to do the work in question, and being so directed, he made no objection to it. It was ingeniously attempted by Mr. Bompass, in the last part of his argument, to say, *If any- [135 body directs you to do that which he has no right to direct you to do without remunerating you, he must be held to be under a contract to pay *quantum meruit*. The answer is, that that is not the case before us here. Whether that might be had recourse to in any other form of action it is not for us to say. We have neither the form of case nor the statements which would enable us to arrive at a conclusion on the subject. All we have before us is a declaration stating that there was an implied engagement or warranty entered into on the part of the defendants with reference to the mode in which this work was to be executed, and a special case stated, upon which we are asked to inquire whether or not there was any such implied warranty as is stated in the declaration, "*or*," as would give rise to a claim for remuneration, the word "warranty" being necessary to the terms of the question. The grammatical construction requires, and no other construction could be put upon it, that the meaning of the word "warranty" there, is, either a warranty such as is stated in the declaration, or such warranty as would give this right of action. And if we should find that there is such a warranty (here it is put properly in the conjunctive), if the warranty be found, "*and*" if you find farther, that the facts have occurred which carried that warranty into effect, then the remedy which the plaintiff seeks is to be accorded to him.

My Lords, if, as has been strongly contended upon this appeal, there can be found any warranty in such a contract

as this, I apprehend it would be scarcely possible for any person whatever to enter upon any new work of any description ; say the tubular bridge, for instance, which was originally a bold speculation, I believe, on the part of Mr. Stephenson. Any work of that kind, which must necessarily be in a great degree speculative, could scarcely be carried into effect if any person entering into a contract for the performance of that work, with a contractor, was to be supposed to have guaranteed to the contractor that the performance of it was possible. We have had no authority for such a doctrine as that cited before us, and I apprehend it will be impossible to find any authority, as indeed none has been found, which has gone any way whatever near to that doctrine as here contended for.

[36] *The last authority, *Appleby v. Myers* ('), cited by Mr. Bompas—a case decided one way in the court below, and afterwards varied by the court above—proceeded upon an entirely contrary view of the case, namely, that where there was found to be only such a result occurring as had not been foreseen by either party, you could not proceed on any such doctrine of warranty. No doubt all persons are distinctly bound not to do anything towards impeding their own engagements, but that is a very long way indeed from a case of this description. Supposing the present defendants had said in so many terms, We, the Corporation of London, are about to engage in this very important work, namely, the rebuilding of Blackfriars bridge, and we have secured for our assistance in laying out the designs for that work the services of an eminent engineer. Supposing they had then proceeded to state who that engineer was, and had named Mr. Cubitt, what would that have amounted to? No more than to a representation that they had engaged an engineer—and that that engineer is one of a certain standing in the profession. Does it go a bit beyond that? Does it proceed to say that the engineer is infallible, or has never made a mistake, or can never make a mistake for all time to come, and that the defendants give a warranty to that effect?

Nothing has been done since the date of entering into the contract by which the defendants have in any way impeded the execution of the works in the mode proposed by the specification. Instead of being something done after the contract was entered into, the case alleged is that a contract was entered into with the advice of a person, which advice turns out, unfortunately, not to have been so good as might

(¹) Law Rep., 2 C. P., 651.

have been expected from his position. That is no representation at all, nor does the contract amount to anything like a representation that "the advice which we have secured is such that you may confidently, acting upon it, enter into this engagement." All that was done was to inform the person with whom the contract was made, of all the surrounding circumstances in which the defendants were disposed to enter into the contract. The statement of every one of those surrounding *circumstances was correct. [137 Mr. Cubitt had been employed, and the designs had been prepared by him, but it turned out unfortunately that there was an error made as to the feasibility of executing those designs in the way he contemplated.

Now, my Lords, I am quite clear on the point of principle here. There is nothing, I am sure, to induce your Lordships to lay down a new principle of law by which anybody entering into a contract, must be supposed to have obtained an implied warranty, from the person engaging him, that the contract itself can be fully carried out without impediment, whether that impediment be one he is himself able to foresee or not.

LORD O'HAGAN: My Lords, supposing, as I think it is perfectly clear, notwithstanding the extremely able argument that has been addressed to us, that upon the pleadings and the special case, the plaintiff cannot recover damages as on a *quantum meruit*, and that the question for your Lordships' opinion regards only the implied warranty on which he has relied, I concur fully with my noble and learned friends who have addressed the House.

Confessedly there is no authority in support of the plaintiff's case. Such an action under such circumstances has never been sustained, and it lies upon the plaintiff to show that it is sustainable.

There is no express warranty, and I see no reason for implying one. The parties did not understand, in my opinion, that any warranty was to be given. No such understanding is manifested in the contract or specification, and the notice of the defendants merely informed contractors as to the place in which they might examine the plans and specifications, and obtain farther particulars for their assistance in deciding for themselves, and with any advice which might be available to them, as to their acceptance of the proposed contract. It did not profess to do more; it gave no indication of a purpose to give such a warranty as is now alleged. And Mr. Cubitt, who was named in it, had no power within the scope of his authority indicated in the

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special case, as engineer or as agent, to warrant anything. [38] At his office needful *information was to be got, and the case finds that it was ample to enable the contractors to discover the difficulties in carrying out the work which afterwards affected them so injuriously. They had an engineer, and if he was of "competent skill and knowledge," and had carefully examined the specifications and drawings, the special case informs us that he would have made that important discovery. So that the opportunities of knowledge were really very equal between the parties. It is much to be regretted that the contractors omitted a precaution which in so grave a matter would seem to have been reasonable and wise. It is unfortunate that they should be subjected to such serious loss; but I do not think that your Lordships can intervene to save them from the results of their own improvidence, by making, for the parties, a contract which they never contemplated, and inserting in it a warranty of which no one ever thought, which was never demanded on the one side, and if it had been, would, I feel assured, have been refused upon the other.

On this short ground I think the judgment of the Exchequer Chamber should be affirmed, and the appeal dismissed with costs.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

Lords' Journals, 18th February, 1876.

Solicitor for the appellant: *J. B. Batten.*

Solicitor for the respondent: *Brand.*

[Law Reports, 1 Appeal Cases, 139.]

H.L. (E.), Feb. 21, 1876.

[HOUSE OF LORDS.]

**139] *THE REPUBLIC OF LIBERIA, Appellants; and
EDWARD FARROW ROYE, Respondent.**

Practice—Dismissal of Bill.

The Court of Chancery has not only full power to stay all proceedings in a suit till the plaintiff has made a discovery which it has called upon him to make, but, if not satisfied that its order has been properly obeyed, may dismiss the suit itself; and where money has been paid into court, may direct the payment of that money out of court to the party entitled to it.

Per LORD HATHERLEY: When any step ought to be taken in a cause, which, in the judgment of the court, is necessary in order to facilitate the decision of the cause, and default is made, the party in default, if plaintiff, is liable to have his bill dismissed. And this is not a matter of first impression.

THIS was an appeal against an order of Vice-Chancellor Malins⁽¹⁾, which had been confirmed by the Lords Justices⁽²⁾.

Mr. Edward James Roye, a merchant in Liberia, had been President of that Republic. A loan was raised for the purposes of the government, and it was alleged that the President had improperly appropriated, for his own political purposes, a considerable part of this loan. He was deposed, and charged with high treason; his son, the present respondent, who had been in his father's time Secretary to the Treasury, was subjected to a similar charge. The son was acquitted, and came to England. The father was condemned; he, however, got out of prison and tried to escape to an English vessel; he was either drowned or killed in making the attempt. Money had been paid on his account into the Commercial Bank of Liverpool, and the Republic became plaintiff in a Chancery suit against the present respondent, the personal representative of his father, who claimed to be entitled to this money. The bill in Chancery was originally filed on the 6th of December, 1871; it was amended on the 17th of January, 1872; and reamended on the 11th of July, 1872. The sum claimed from the *re-[140 spondent was £4,000. By an order of the court this sum had been paid into court and invested.

The answer of the respondent was filed on the 18th of November, 1872, and set up an absolute claim to the sum in dispute. There were intermediate proceedings, and the replication was not filed till the 22d of January, 1874. On the 31st of May, 1873, an application had been made to Vice-Chancellor Malins, who, on that day, made an order that the Republic should, on or before the 2d of November, 1873, file full and sufficient affidavit or affidavits, to be made by one or more of its officers or ministers, stating whether it has, or has had, in its possession any, and if any, what documents relating to the matters in question in this suit, and accounting for the same. The appellants alleged that this order had not been served on the solicitors till the 23d of June, 1873. Many letters passed between the solicitors of the two parties; the subject of this application for discovery, and the time mentioned in the order was several times enlarged. On the 23d of April, 1874, the court, on the motion of the appellants, enlarged the time for the filing of the affidavits to the 12th of July, 1874, and it was ordered that default therein should be certified by the Chief Clerk, and that the money should then be paid out to the

(1) Law Rep., 16 Eq., 179. -

(2) Law Rep., 9 Ch. Ap., 569.

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respondent, and that the bill against him should stand dismissed with costs. On the 1st of June and the 17th of June, 1874, affidavits were put in on behalf of the Republic. A summons to consider the sufficiency of the affidavits was taken out, and was adjourned to the 13th of July, as on the previous day the date fixed by the Vice-Chancellor's order would expire; but in the meantime the appellants applied to the Lords Justices, who, on the 8th of July, made an order, in substance adopting the Vice-Chancellor's order, but giving time to the Republic till the 28th of July to file the required affidavits, till which time the order of the 23d of April was suspended. On the 18th of July, 1874, Mr. Jackson, the Consul-General in this country for the Republic of Liberia, filed an affidavit, in which he said that, "according to the best of his knowledge, remembrance, information and belief," the plaintiff Republic never had possession of the books and papers removed by the defendant. The Chief Clerk thought this affidavit to be insufficient. On the 5th of August, 1874, the Chief Clerk certified [41] *that the appellants were in default. On the 7th of August the appellants took out a summons to vary this certificate, which summons was heard on the 11th of November, 1874, when the Vice-Chancellor, in Chambers, refused to make any order on it. On the 17th of November notice was given of a motion to discharge the order, and this motion was heard on the 12th of January, 1875, when it was refused with costs. This appeal was then brought against the order of the Lords Justices of the 8th of July, 1874, and that of Vice-Chancellor Malins of the 12th of January, 1875.

Mr. Glasse, Q.C., and Mr. B. Bickley Rogers, for the Republic: The course which had been taken in this case was not justified by the practice of the court. There were difficulties in getting an order, such as that of the Vice-Chancellor's, properly obeyed in a place like Liberia, where there were no solicitors of skill sufficient to know what would be deemed satisfactory to the court. The best that could be had been done; and if the affidavit of the Consul-General was not sufficient, farther time ought to have been given. It was, at least, quite premature to dismiss the bill when other affidavits might have been procured.

[*Princess of Wales v. Earl of Liverpool* (1) and *United States v. Wagner* (2) were referred to and commented on.]

Mr. Higgins, Q.C., and Mr. Langley, for the respondent, were not called on to address the House.

(1) 1 Sw., 114; 3 Sw., 507.

Republic of Peru v. Weguetin, Law Rep.,

(2) Law Rep., 2 Ch. Ap., 582; see also 20 Eq., 140.

THE LORD CHANCELLOR (Lord Cairns): My Lords, this appeal comes before your Lordships from the Court of Chancery upon a question of practice, and upon a question of practice alone; perhaps I should be more correct in saying upon two, if not three, points of practice; and I prefer to take them in succession for the few observations I have to make.

My Lords, your Lordships are called upon in the first place to decide a question which rarely comes before this House for consideration, namely, whether an affidavit as to documents, made on *behalf of the plaintiffs in a suit [142 in a suit in chancery, is or is not a sufficient affidavit. Now, my Lords, I own I have no doubt at all that upon this point the decision of the learned Vice-Chancellor was entirely correct. A foreign Republic was suing in this country. According to the ordinary practice of the court the Republic, as plaintiff, was called upon to make a discovery of all documents in its possession. That discovery must be made by an affidavit, and as that affidavit cannot be made by a republic, it must therefore be made by an officer of the Republic; and accordingly the Vice-Chancellor directed that a full and sufficient affidavit should be made by an officer or officers of the Republic. Whether the affidavit would be full and sufficient would depend, among other things, upon who was the officer of the Republic by whom it was made. Was it an officer who would know anything about that of which he was speaking, or was he a person who, while technically an officer of the Republic, would really be without any knowledge whatever on the subject upon which he was making the affidavit?

My Lords, after some delay the officer, the person selected to make the affidavit, was the Consul-General of the Republic in England. He knew nothing at all about the documents, which were abroad. What he knew was this, that a certain number of documents had been sent home to England, and those of course he could accurately specify as being in England. But the material point upon which his information would be important would be not as to the documents in England, but by way of negation, for the purpose of assuring the defendant that there were no other documents abroad relating to the subject-matter. Upon that point all that the Consul-General could say was this, that to the best of his knowledge, information and belief, there were no such other documents. Of course that could be merely such information as was sent to him. Personal knowledge of the subject he did not profess to have, and

from the nature of the case he could not have. The Vice-Chancellor thought that that was not the full and sufficient affidavit which he had desired from an officer of the Republic. If I had any hesitation in coming to that conclusion, I should doubt, very much, the propriety of differing from the judge who had the whole control and administration of the case. But, *my Lords, I own that my mind goes entirely with that of the Vice-Chancellor in saying that I think the Consul-General was not the proper officer of the Republic to make the affidavit, but that some person on the spot, so far as I could see, would have been the proper person to make the affidavit.

Now, my Lords, farther than that, the affidavit being insufficient, there arises the questions of the course taken by the court as to this suit. Three different opportunities having been given of making this affidavit, and it not having been made, there was an order of the court made by the Vice-Chancellor, and confirmed by the Lords Justices, that for default of the affidavit the bill should be dismissed, and a sum of money which had been standing at a particular bank to the account of an intestate represented by the defendant, should be repaid to the defendant as representing that intestate, and as having a previous and prior claim to the money. My Lords, it has been questioned whether such an order was within the jurisdiction and competence of the Court of Chancery.

My Lords, I have not a shadow of a doubt upon that point. I hold it to be clear and well established that the Court of Chancery has, in the first place, jurisdiction to stay all proceedings in a cause until the plaintiff has made any discovery which he is called upon by the order of the court to make. But, my Lords, if the Court of Chancery has power to stay proceedings until a discovery is made, is it to go on constantly staying those proceedings and to go no farther? And above all, is that to be the only course open to it where something has been impounded. Some money taken possession of, the appropriation of which may be extremely inconvenient, indeed may be ruinous to the person from whose hands it is taken? Can anything be supposed more calculated to lead to injustice and wrong than that money should be taken and impounded in the Court of Chancery upon a case alleged by a plaintiff, which might be displaced by documents in his possession, and that he all the while is to hold his suit, retain the money in court, and refuse to divulge the documents which would overthrow the title he has alleged? My Lords, that of course is an ex-

treme case. I do not say it is the case before your Lordships, but it shows that the jurisdiction of the Court of Chancery *cannot be limited to a mere stay of pro- [144
ceedings. The Court of Chancery must have of necessity the right to go farther, and to say that after a proper interval the proceedings which have been stayed shall be altogether expelled from the court, and any property which the court has taken possession of, be restored to the person from whom it was taken. Therefore, my Lords, upon the general and abstract question, I entertain no doubt that it was within the jurisdiction of the Court of Chancery to dismiss this bill for default of proper discovery.

Then, my Lords, another question would arise, whether, in the discretion of the court, a proper length of time, and proper opportunities had been allowed to the plaintiff Republic to make the discovery. My Lords, upon that point I certainly should be extremely unwilling that your Lordships, upon a mere question of discretion, should open what has been done first by the primary judge, and then sustained by the unanimous decision of the Court of Appeal in Chancery. The judge of first instance, the Vice-Chancellor, and the learned judges of the Court of Appeal, in a case of this kind must be very much better qualified to judge, than your Lordships can be in this House, how far in their discretion latitude should be allowed, and how far time should be given to a plaintiff under these circumstances. I do not desire to say whether, if it had fallen to me in the first instance to deal with this case, or to sit upon it as a member of the Court of Appeal in Chancery, I might or might not have granted a greater latitude to the plaintiff and greater indulgence in point of time. My Lords, I think that the main point which your Lordships have to consider is, was the order within the jurisdiction of the Court of Chancery; and if you think, as I believe you will, that it was within the jurisdiction, then I should hold that the discretion having been exercised by the unanimous decision of the Vice-Chancellor and of the Lords Justices, it would indeed be contrary to the practice which I have known to prevail in your Lordships' House, if, upon a question of discretion alone, you were to adopt a different course here and enlarge a latitude which those learned persons have thought has been already sufficiently given to a plaintiff.

I therefore move your Lordships that this appeal should be dismissed with costs.

*LORD CHELMSFORD: I entirely agree.

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LORD HATHERLEY: My Lords, I have no doubt whatever

(and I think I ought to express as much) with respect to the general doctrine. All that we have to consider in this case is as to the power of the court to deal with a plaintiff's suit in such a manner as is consonant with the justice of the case. My Lords, it is by no means, I think, a case of first impression, that when any step ought to be taken in the cause, which in the judgment of the court is necessary to be taken, in order to facilitate the decision of the cause, the party in default in taking that step, if he be the plaintiff, is liable to have his bill dismissed, whatever be the ground, technically, upon which that may occur, whether it be that he has not brought his witnesses at the right time, whether it be that he has not taken any other step in the suit according to the time prescribed by the orders of the court, or whether it be that from his neglecting to perform something which he was ordered by the court to perform, and which the court thinks is essential to the proper and just consideration of the cause, the court may take the step in the cause which it has taken here, and say, If you delay your cause so that it cannot be brought to a hearing because you are in default, we shall direct, in case of your farther default in proceeding to expedite it, that the bill shall be dismissed. If money has been paid into court, it is a matter of course, I had almost said of every day practice, for the court, upon the dismissal of the bill on the hearing, to direct that the money which has been paid into court shall be repaid to the person who, having paid the money into court to await the event of the suit, and the suit being delayed by the default of the plaintiff, is entitled to ask that the money shall be repaid to him.

My Lords, as respects the special affidavit which was made in this case, I cannot have any doubt whatever that it was insufficient, having regard to the position of the parties. If a defendant, *simpliciter*, one of the persons directly concerned, is asked to make an affidavit as to the state of documents in his possession, then, whatever be the state of [146] the documents within his own knowledge, *he is answerable, upon his oath, to state what he knows upon that subject, and when he swears that there were such and such documents and no others, that oath is all that the person asking the discovery of documents is entitled to. But if he is not a person who himself has charge of those documents, as an officer of a corporation, or, as in this case, an officer of a Republic, he must state what are his sources of knowledge, what his means of information are, and it is not enough for him to say, "To the best of my belief these are all the

documents that can be had," when it may not be any part of his duty to know anything whatever upon the subject. If he has not explained that properly and sufficiently, the court has not that which it requires, and which it has a right to have, namely, the sanction of the oath of the proper officer acting on behalf of the plaintiff (in this suit the Republic of Liberia) that those are all the documents. The Consul-General says that these are all the documents in this country, but it appears from the correspondence which has since been going on that there are many other documents in Liberia. But it is said that owing to the circumstances which were stated at the bar, namely, that there are no solicitors there, and no persons skilled in matters connected with the administration of law and getting up cases like the present, and that owing to the want of skill on the part of local parties, the documents cannot be arrived at or enumerated. That being so, it becomes all the more necessary that steps should be taken by some competent person having proper skill, and that the matter should not be left to an officer in this country, however competent he may be in other respects, who happens to be the person carrying on the affairs of the Republic here as the Consul-General. He cannot, as it appears to me, from the information before us, be taken to be the depository, or to be the person properly informed of the documents which the Republic possesses in relation to this particular suit.

It seems to me, therefore, my Lords, in every point of view, that the order from which this appeal is presented is correct, and whatever degree of hardship there may be in consequence of the time having been unusually short which was given for the production of this affidavit, still that is a point we should hardly deal with. It is a matter for the discretion of the judges of the two *courts, and they [147 have exercised their discretion upon it. Therefore all we can do upon the present occasion is to dismiss the appeal with costs.

LORD O'HAGAN: My Lords, I wish merely to add that I quite concur with the view of the learned Vice-Chancellor, who seems to have acted in this case at once with strict justice and much consideration towards the appellants. His order was made on the 24th of April, 1874; and repeated opportunities of compliance with it were offered, from time to time, until the 28th of July, 1875, which was fixed by the Lords Justices as the latest day for the filing of the necessary affidavit. The appellants, although in a distant country, could undoubtedly have fulfilled the duty cast

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upon them during that considerable period, but they failed to do so, and it was for the learned judge to consider, in his discretion, whether the proceedings could properly be farther delayed, and the large sum of money, which had been attached, longer detained in court. He resolved the question in the negative, and that on no light or technical ground—as has been represented at the bar—but for very substantial reasons. The affidavit was in no way, in the judgment of the Vice-Chancellor, “full and sufficient,” according to the terms or the spirit of his order, and he exercised, I think, his undoubted jurisdiction in dismissing the bill, for pertinacious disregard of it. Such a jurisdiction must be inherent in a court of equity; and, indeed, the suggestion impeaching its existence was very faintly urged by the learned counsel for the appellant. The point was not argued, and was not arguable. The power of the court to do what has been done was ample; and I agree with my noble and learned friends, that your Lordships’ House cannot properly interfere with the mode of its discretionary exercise.

I am, therefore, of opinion that the appeal must be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords’ Journals, 21st February, 1876.

Solicitor for the appellant: *Edward Smith.*

Solicitor for the respondent: *Flux & Co.*

[Law Reports, 1 Appeal Cases, 174.]

H.L. (E.), February 29, 1876.

[HOUSE OF LORDS.]

174] *MORRIS ROBERT SYERS, Appellant; and DANIEL BACKHOUSE SYERS and EDWARD LOUIS PARAIRE, Respondents.

Loan—Partnership—28 & 29 Vict. c. 86—Sale of Business.

A., in June, 1869, borrowed £250 from B., and, at the time, signed a paper in the following words: “In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the Limited Partnership Act of the 28 & 29 Vict. c. 86, called an ‘Act to amend the Law of Partnership:’”

Held, that this paper (which contained no provision as to the date or duration of the partnership) constituted a partnership at will; and that it was not put an end to by a letter, dated in August, 1872, in which A. promised to repay B. on the 1st of September, 1872, the principal sum together with interest thereon (treating it only

as a loan) such as should, as on a calculation of one-eighth of the profits, be found to be due to B. on that day. This letter was followed by a tender, which was not accepted.

On a bill filed by B. for specific performance of the agreement to execute a *partnership deed for one-eighth share of the profits, A. put in an answer in [175 which he denied that there had been a partnership at all, but submitted that if any partnership had ever existed it was only a partnership at will, of one-eighth share of the profits (payment of which he offered to make), and he submitted that this partnership had been determined by the letter of August, 1872 :

Held, that it had not been determined by that letter, but that the answer had the effect of putting an end to it; and that accounts must be directed to be taken as up to the day of filing the answer, and that these accounts must include the principal, the eighth share of the profits, and also the eighth share of the assets up to that day.

Per THE LORD CHANCELLOR (Lord Cairns) : A copartnership in profits is a copartnership in the assets by which the profits are made.

Per LORD CHELMSFORD : In order to bring a case within the 28 & 29 Vict. c. 86, there must be a contract in writing, and the document must show on the face of it that the transaction is one of loan : and parol testimony to vary it is inadmissible.

In a case like the present the Court of Chancery has power, in its discretion, to grant either a sale of the undertaking as a going concern, or a proposal for a purchase (by the holder of the seven-eighth share) of the one-eighth share mentioned in the agreement. The House, under the circumstances here, adopted the latter course.

The decrees of the court below varied accordingly, and the cause was remitted to be dealt with according to the order of the House.

THIS was an appeal against an order of the Lords Justices which had varied a previous order of Vice-Chancellor Bacon.

The appellant was the lessee of the music hall in Oxford Street known as "The Oxford," and of "The Boar and Castle" tavern adjoining. The music hall was established in 1869. Mr. Paraire was a receiver appointed under certain deeds, which it is not necessary to consider. Shortly before the actual opening, the appellant, being in want of a sum of ready money, applied to his brother, Daniel B. Syers, the respondent, for an advance of £250. That respondent drew up a paper which was, in form, addressed to himself, and was duly signed by the appellant. It was dated the 8th of June, 1869, and was in the following terms : "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the 'Oxford Music Hall and Tavern,' to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86, called an 'An act to amend the Law of Partnership.'" The money was advanced, and the speculation became successful.

The respondent Syers afterwards claimed to have a deed of *partnership executed, and a deed was drawn up [176 on his behalf, but the appellant refused to execute it. On the 20th of August, 1872, the appellant wrote to his brother

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a letter in which he said: "I now write to say I will repay you the two hundred and fifty pounds which you lent me previous to my opening the 'Oxford,' on the 1st of September next, and will, at once, have estimated the profits of the 'Oxford' up to that date, and, when ascertained, if any, will pay to you that proportion to which you are entitled from the document which I signed when you lent me the money, and so put an end to the transaction and all unpleasantness between us resulting from it. Yours, affectionately, M. R. Syers."

In accordance with this letter (and before the day named in it), a tender was made of the £250, and a promise to have the accounts at once made up was given, but the respondent refused to receive the money, and on the 31st of August filed his bill against the appellant, claiming in substance to be a partner with the appellant in the undertaking, and praying for specific performance of the agreement of the 8th of June, 1869, and for an account and for farther relief.

On the 21st of February, 1873, the appellant put in his answer insisting that the money was advanced by way of loan, and submitting to repay it to the respondent, and to account for and pay to him in lieu of interest thereon one-eighth share of the profits of the undertaking up to the time when repayment was tendered, and submitting farther, that even if the agreement of the 8th of June, 1869, had been (which he denied) an agreement under which Daniel Backhouse Syers was to become a partner with him, Morris Robert Syers, in the said undertaking, it was not one of which the court could enforce specific performance; and farther, that even in that case it constituted at the utmost a partnership only in the profits of the business, and at will, which was effectually determined on the 1st of September by the notice of the 20th of August.

In May, 1873, the respondent amended his bill, and made Mr. Paraire a defendant, and prayed that he might be restrained from paying to the appellant, and that the appellant might be restrained from receiving, any sums in respect of the profits of the undertaking.

[177] *The sum of £995 had been paid into court under an order of the court made without prejudice in the cause, and by a subsequent order the appellant was ordered to pay from time to time one-eighth of the accruing profits of the undertaking.

The cause was heard before Vice-Chancellor Bacon, who, on the 5th of March, 1875, made a decree declaring that the plaintiff, D. B. Syers, was, under the agreement of June,

1869, "a partner of the defendant Morris Robert Syers to the extent of one-eighth of the profits of the music hall and tavern;" and accounts were ordered with costs as to both D. B. Syers and Mr. Paraire.

On appeal, the Lords Justices varied the decree by striking out the words "a partner of the defendant Morris Robert Syers to the extent of," and inserting in lieu thereof the word "entitled" and in other respects affirmed the decree.

This appeal was then brought.

Mr. *Southgate*, Q.C., and Mr. *W. Pearson*, Q.C. (Mr. *H. C. Phear* was with them), for the appellant: The letter of June, 1869, did not constitute, nor was intended to constitute, a partnership. The word "partnership" was used to describe a title, not to take the profits, but to take a sum which was to be calculated at one-eighth part of what those profits might be. Of course it was expected that that sort of arrangement would give the respondent more than he would obtain by a payment of common interest on the sum advanced. The respondent himself showed that he did not mean to engage in a partnership; for, though he used that word, he took care to repudiate its effects by his express reference to what he called the Limited Partnership Act, which, in fact, was an act that was intended to protect persons who received interest on money advanced to a business, or already invested in it, from being thereby made liable as partners. This transaction was merely that of a loan, with the advantage secured of getting a greater income from it than interest on a loan would give, and yet without incurring any partnership liability. If there was any pretence to give it the character of a partnership, it could only be a partnership at will, and that had been dissolved by the notice contained in the letter of August, 1872. The appellant had tendered the payment of all that could really be *said to be due up to the [178 1st of September, 1872, and the bill ought to have been dismissed. The terms of the document are inconsistent and incoherent, and specific performance of the terms of such a paper cannot be directed. The question of the real intention of the parties can be tried at law.

Mr. *Cotton*, Q.C., and Mr. *T. A. Roberts*, for the respondent, relied on the words of the agreement of June, 1869, which the appellant had deliberately signed, and which constituted a partnership as to the one-eighth share of the profits and assets. Such a partnership could only be dissolved by mutual arrangement, or there might be an order for the sale of the concern.

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Mr. *Caldecott* appeared for Mr. Paraire, and asked for costs.

Mr. *Southgate* replied.

THE LORD CHANCELLOR (Lord Cairns): My Lords, there is no question that the dealing between the two litigants here—two brothers—has been of a character which has caused considerable difficulty as to what may be exactly the definition of their relative rights. When the case came before the Vice-Chancellor, he made a decree which, as far as the wording of the decree went, declared that the brothers were partners, because, by it, the court declared that “the plaintiff was, under the agreement” made between them in 1869, “in the plaintiff’s bill mentioned, a partner of the defendant Morris” “to the extent of one-eighth of the profits of the music hall.” But then, when the Vice-Chancellor, at the close of his judgment, was asked by the counsel this question, “Does your honor treat it as a partnership dissolved?” the Vice-Chancellor answered, “No; I treat it as a purchase.” When your Lordships refer back, however, to the decree of the Vice-Chancellor, you find that, contrary to what is usual in such cases, there is no declaration as to what is the limit or duration of the partnership, or as to whether it is a partnership at will; nor, on the other hand, is there any order for the dissolution of the partnership; but there is this, which is certainly not very usual, an order for the accounts, which must be accounts of the profits of the partnership, up to the time of the decree apparently, [179] and an order for payment, without saying what was to be done for the future—whether the parties were to lapse again into a state of controversy and dispute, or whether they were to be declared to be connected in partnership for any particular length of time.

Then, my Lords, when the question came by appeal before the Lords Justices, their Lordships seem to have been pressed with this difficulty. They struck out from the decree all reference to a partnership, and, as I read their opinions, they do not proceed upon the footing of a partnership. Lord Justice James certainly used the expression, a “*quasi* partnership,” which would seem rather to imply that there was not, at all events, a real partnership; but Lord Justice Mellish appears not to have entertained the idea of a partnership, or a *quasi* partnership, at all; but, on the contrary, to think that the agreement might mean an agreement under the statute of 28 & 29 Vict. c. 86, which is a statute, as your Lordships are aware, which negatives the idea of the existence of a partnership. Accordingly, the decree, as altered

by the Lords Justices, declared, not that the plaintiff and the defendant were partners, but that the plaintiff was, under the agreement of the 8th of June, 1869, entitled to "one-eighth of the profits of the music hall called 'The Oxford,' and tavern called 'The Boar and Castle,' in the bill mentioned."

My Lords, whatever conclusion your Lordships may arrive at upon the subject, I apprehend that it is impossible that the case can be left in the state in which it is brought up to your Lordships' House. You will, I think, have to determine whether, on the one hand, there is a partnership between these persons, or, on the other hand, if there is not a partnership, whether there has been simply a contract of loan which either ranges itself under the provisions of the statute to which I have referred, or is a contract of loan which, however open to objection by an outside creditor, is, at all events, a valid contract of loan between these parties.

My Lords, fortunately the determination of this question has not to be sought for through any number of documents. It depends upon the construction of one document alone, the letter, to which I have already referred, of the 8th of June, 1869; and to the construction of that document I now invite your Lordships' *attention. That docu- [180 ment is addressed by the appellant to the respondent; it passed between them just before the tavern or place of entertainment in question in Oxford Street was opened, and it was given by the appellant to the respondent on the occasion of the respondent furnishing him with a sum of £250 for the purpose of starting that speculation. It runs thus: [His Lordship read it, see *ante*, p. 175.]

Now, my Lords, the first observation that I make upon this letter is this: whether your Lordships take it to be a letter pointing to a partnership, or a letter pointing to a loan; neither in the one case nor in the other is there any term specified as the duration of the partnership, or the loan, as the case may be. If it is a partnership, it is a partnership without a term, that is to say, a partnership at will. If it is a loan, it is a loan without any term being specified for its duration, that is to say, it is a loan which, on the one hand, may be called in at any time, and, on the other hand, may be paid off without any notice.

My Lords, I asked one of the learned counsel who argued the case at your Lordships' bar, whether there were any words which they could point to, which stipulated for any particular duration of the loan, or of the partnership, as the case might be. Mr. Cotton admitted that there were no

such words, but he said that the court below had been struck by the great improbability that any person would have advanced money to a concern of this kind to be recompensed only by profits, if before any profits were earned he could be paid off without any interest. My Lords, it is dangerous, I think, to speculate upon what we may suppose would have been the intention of the parties; but even upon that suggestion I might add a counter suggestion, that it might well be in the mind of the person advancing the money, that he did not desire to fetter himself as to the right to call in his money, because the business might turn out to be an unprofitable one, and he might desire, in that event, before farther loss was incurred, to get back the capital of the money he had advanced, intact; and he could not be free to recall this capital, his money, unless, on the other hand, the person to whom the money was paid was free to pay him off at any time. Therefore I submit to your Lordships that we must not indulge in any speculation or conjecture as to [181] what the parties *might have stipulated for. We must look at what they have stipulated for, and we find that they have not stipulated for any specific duration of this contract, whatever its nature may be.

Then, my Lords, the only question is, what is the contract; is it partnership, or is it loan? There again, the only difference between those two constructions is this: if it is loan, the person advancing the money, the plaintiff in the case, the respondent at your Lordships' bar, is entitled to have his capital back, and his aliquot share of the profits made in the business up to the time of the repayment. On the other hand, if it is partnership, he will be entitled, if the assets are sufficient, not merely to be repaid the capital sum he has advanced and his aliquot share of the profits; but he will be entitled in some way to ascertain with regard to the assets of the partnership, whether they are greater now in value than they were at the time the business commenced, in other words, whether, if this business were to be sold as a going concern, after paying all charges upon it, and all capital brought into it, there will be a surplus to one-eighth of which he, as a partner, will be entitled.

Now, my Lords, I repeat, to which category, of partnership, or of loan, is this agreement to be assigned? Your Lordships have, at the outset, these very strong and distinct words, which it certainly is difficult to get over, "I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the Oxford Music

Hall." The expression is clear—it is to be a "copartnership." But then it is said, "But it is only to be a copartnership in profits." A copartnership in profits, as we all know, is a copartnership in those assets by which the profits are made and produced. If, therefore, your Lordships are to take the first part of this letter as containing the governing idea, it is a letter stipulating for a copartnership. But then the second part of the letter bears in a different direction. The deed of copartnership is "to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86, called 'An act to amend the Law of Partnership.'" Now if your Lordships take this latter clause of the sentence, not regarding the first clause, you arrive at the conclusion that the deed is to be drawn up in conformity with that act of Parliament. But that act of Parliament is an act which does not contemplate, *but rather negatives, the idea of a [182 partnership, and dwells upon the theory, not of a partnership, but of a loan. Therefore if you were to take the latter part of this sentence alone, it would lead you to a conclusion in favor of a loan and not of a partnership.

But, my Lords, is there no way by which the whole of the letter may be reconciled and effect given, not only to the first, but to the second part of it? Undoubtedly the letter is inartificial in its terms, undoubtedly it has been drawn up by some person who, clearly, has not had a technical knowledge of law and of legal terms. But what your Lordships find clear is this: there is to be a deed of copartnership, and that deed is to be drawn up in some way that will carry into it the governing or leading idea of the Limited Partnership Act. Now the Limited Partnership Act was an act the essence of which was that it gave a protection against outside creditors. It provided that if the parties between themselves stipulated that there should be an interest in profits without any interest in loss—without any complete community between profits and loss—that alone should not make the person receiving profits in that way liable to outside creditors. My Lords, I conceive that the construction which must be given to this letter is, that the writer of it and the person to whom it was addressed, had fastened their minds upon that idea. They wished that the respondent should have profits in the concern but should not bear loss, and in that way the idea of the statute would have effect given to it; but with that they wished that the deed should be "a deed of copartnership;" a deed of copartnership, therefore, in which the stipulation in substance would be that the owner of the one-eighth of the profits was to have

that one-eighth without any liability to be subject to the losses of the concern.

My Lords, in that way, effect is given to every word of the letter, and I cannot myself help thinking that that is really what the parties intended. My Lords, if that is so, there is a partnership at will, a partnership entitling the respondent to one-eighth of the profits of the concern, and, like any other partner, to have it known what his share of the assets of the concern may be.

My Lords, has that partnership at will been terminated? It appears to me that it clearly was terminated when the answer was put in, in this suit. That answer indeed at [183] tempts to say that it *was* terminated at an earlier period—that it was terminated by a letter of the 20th of August, 1872. But when your Lordships look at that letter you find that it is a letter going entirely upon the theory of loan; offering to repay the money as a loan with a share of profits in lieu of interest, not taking any notice of a partnership or of any interest in assets, but rather bearing in opposition to the idea of a partnership. I cannot see how that letter could of itself operate as a dissolution of a partnership which was repudiated at that time. But the answer appears to me to stand upon a very different footing. I will not read the answer, for your Lordships have heard it read, but what it says in substance is this: “I, the defendant, as a matter of law dispute that there is any partnership. I say that there is a loan and nothing but a loan; but if there is a partnership—if that point is decided against me, and if this, which is a question of law, is determined in favor of my opponent, if the court says there is a partnership—then I submit that it was effectually determined on the 1st of September by the letter” (which I before mentioned) “of the 20th of August.” But if it was not terminated by that letter, there is in this answer the clearest intimation that the will of the partner, at whose will the partnership was constituted, is against any continuance of the partnership; and whether that will is expressed by a letter or by an answer, or in any other way, is immaterial. There is no technicality, no magic as to the mode of expression. There is here the clearest intimation given by the answer that if there is a partnership, the defendant wishes it no longer to continue.

Therefore, my Lords, the result, in my opinion, is, that there was a partnership, but that that partnership was terminated at the time of putting in the answer. My Lords, it is very true, as was said at the bar, that on dissolving a

partnership of this kind the ordinary course would be for the court to direct a sale of the assets, and, if necessary, a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the judge in Chambers. My Lords, those provisions are moulded in every case by the court to meet the circumstances of the particular case; and it appears to me that, looking at the nature of this business, and looking at the very small interest which was taken in it by the respondent, it would certainly not be *desirable in this case to [184 have a sale, or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them. It is a case, therefore, in which, if a decree for a dissolution had been made in the first instance, I apprehend that the court would have thought it right to authorize the owner of seven-eighths of the concern to lay proposals for a purchase before the judge in Chambers. I am about to submit to your Lordships a provision which will, I think, in another way, arrive in substance at the same end.

If your Lordships agree with me, you will, in the first place, reverse the decree of the Vice-Chancellor, and of the Lords Justices, and substitute the decree I am about to read. But before reading that decree I ought to mention that the costs of the respondent Paraire ought, I think, to be disposed of, and that the respondent D. B. Syers, who appears to have brought him here unnecessarily, ought to pay his costs.

My Lords, I would propose to your Lordships to declare that under the terms of the letter of the 8th of June, 1869, the respondent became entitled, as a partner with the appellant, to one-eighth share of the profits of the Oxford Music Hall and Tavern in the pleadings mentioned; and that the partnership between them was dissolved at and from the 21st of February, 1873 (the time of filing the answer of the appellant), and that the sum of £250 mentioned in the said letter, is to be taken as capital brought by the respondent into the partnership without interest. Then there will be a direction to take an account of the receipts and payments of and respecting the said music hall and tavern, and of the gains and profits thereof, from the 8th of June, 1869, down to the 21st of February, 1873, in order to ascertain the plaintiff's one-eighth part thereof. Then an inquiry what sum would represent the plaintiff's one-eighth share in the value of the said music hall and tavern, if sold as a going concern, after deducting all charges thereon and all liabilities of the business. Then on payment by the defendant to the plain-

tiff, within a time to be fixed by the judge in Chambers, of the £250, and the sums coming to him under those heads, Nos. 1 and 2, which I have read, no farther accounts, but the defendant to pay the costs up to the hearing. No other costs up to this time. The costs of the accounts to be [185] *in the discretion of the judge in Chambers. Then, if the payments which I have specified are not made by the defendant, direct a sale of the hall and tavern as a going concern, and a division of the assets of the partnership in the usual way, with liberty to apply in Chambers as to the form of such direction.

LORD CHELMSFORD: My Lords, this case must be determined entirely upon the written contract between the parties. That contract is, "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern." So far the contract is perfectly clear in its terms, but then it goes on to provide that the deed, that is, the deed of copartnership, is "to be drawn up under the Limited Partnership Act." This reference to the Limited Partnership Act shows that the parties have misunderstood its provisions. They appear to have thought that there might be a deed of copartnership in terms, but, if expressed to be drawn up under the Limited Partnership Act, that the person advancing the money would not be completely a partner, nor be responsible as such.

But in order to bring a case within the act there must be a contract in writing; and according to my reading of the act the contract must, on the face of it, show that the transaction is a loan. The 1st section of the act is in these terms: "The advance of money by way of loan to a person engaged in, or about to engage in, any trade or undertaking upon a contract in writing with such person that the lender" "shall receive a share of the profits," "shall not of itself constitute the lender a partner" "or render him responsible as such." Now, this contract, so far from stating that the agreement of the parties was for a loan, states the direct contrary. Its terms are "in consideration of the sum of £250 this day," not *lent* but "*paid*, to me, I undertake to execute a deed of *copartnership*." And the deed of copartnership is "to be drawn up under the Limited Partnership Act." But such a deed could not be so drawn, because the act requires a contract in writing upon the footing of a loan, and there is no such contract between the parties. And parol testimony

to vary the terms of a written *instrument, where by [186 act of Parliament it must be in writing, is inadmissible.

Therefore, my Lords, upon these short grounds, I agree entirely with my noble and learned friend as to the determination of this appeal, and as to the declarations which he has proposed.

LORD HATHERLEY: My Lords, I entirely concur.

There is no doubt some difficulty in giving a precise effect to every word contained in this contract; but, in the first place, I have to remark upon it, that such a difficulty will not relieve any tribunal from the duty, if possible, to give a construction, and, as far as the words will admit of it, a reasonable and coherent construction to every part of the instrument. As regards a part of the case which has been argued before us, namely, that the instrument is so incoherent that the parties must be left at law to make the best of it, I only observe that that is the last resource of any court before which a question of construction is raised, and that the first duty of the court is to give a reasonable construction if possible.

Farther than that, it was said that, this being a case of specific performance, it would be sufficient for those who resisted that performance to say that the instrument itself was doubtful, and that one understood it in one sense and the other party understood it in another and a different sense, and therefore it is not to be performed. It is a good defence to a bill for specific performance to say that there was a mistake in fact on the part of either of the persons who engaged in the contract, which renders it inequitable that, against such a mistake in fact, a construction should be forced upon him, which he was unprepared for, in consequence of having been misled (not necessarily by his opponent) as to the circumstances and facts of the case. But there is nothing of that kind here.

The whole question in the present case turns upon the construction of the document. Both sides agree that it was written out deliberately, and that at that time no other construction was put upon it than such as it might bear when properly construed. Therefore one approaches the instrument with a desire to make it *intelligible and [187 consistent as far as is possible; and it seems to me that the first part of it is intelligible beyond all dispute. It begins thus: "In consideration of the sum of £250 this day paid to me." This does not necessarily indicate a purchase in itself, because a sum may be paid either in the way of purchase or of loan; and if it had rested there the case might

have been left *in dubio*. But we must read farther: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the Oxford Music Hall." Nothing, of course, can be clearer than that contract, as far as it has yet proceeded. It is an undertaking to execute a deed of copartnership of one-eighth share, in other words to sell that one-eighth share (that is the only meaning that can be attributed to the words, as far as they are here expressed), in this business which I have in hand, and am about to undertake. I introduce these last words from what is before us *déhors* the instrument, showing that the business was at that time about to be undertaken and commenced.

Then it proceeds to mention that which has occasioned all the difficulty in the case, and that is that this deed is "to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86, called 'An act to amend the Law of Partnership.'" That undoubtedly cannot possibly be done literally, because, as has been pointed out by my noble and learned friend who has last addressed your Lordships, that act would point to something entirely different, as between the parties to the instruments which are sanctioned by that act, namely, the express case of loans, whether loans upon which interest is to be paid, or loans upon which in lieu of interest any specified share of the profits of the partnership is given—a circumstance which it is said expressly is not, in itself, to constitute a partnership.

But I think that a reasonable construction to be put upon that phraseology, as connected with the clear and indisputable phraseology in the first portion of the agreement, with reference to selling the eighth share, is that which has been put upon it by my noble and learned friend on the woolsack, namely, that, *inter se*, the intention of the parties was that the person who became entitled to this one-eighth [188] share should not be, on that account, liable to *losses as between the two parties to the engagement. They could not bind the external world or creditors, no doubt, by any such arrangement between themselves, but, as between themselves, having observed that there were cases in which, under this act of Parliament, deeds might be framed whereby those engaging in a transaction might stipulate that the profits of the concern should be divided between them, whilst one of the parties should not be liable to loss,—having seen that that arrangement might be entered into when the deed was framed with proper care, and with due reference to the act of Parlia-

ment, we may take it that, as far as they comprehend the act, the intention of the parties was to avail themselves of that mode of proceeding. If they could have done so, they would doubtless have wished to extend it to the external world, but that was impossible. As between themselves, at least, their intention was that one party should have one-eighth of the profits of the concern, without being liable to losses to happen in respect of the partnership. I mean one-eighth of the profits, of course, after the balance of profits and loss had been struck.

My Lords, the defect, as it appears to me, in each of the decrees is this. Having now read through the contract, whether it be a contract of loan, or whether it be a contract of partnership, we find that there is nothing whatever to limit the duration of the loan, nothing whatever to express the duration of the partnership. Now according to the general law in such cases, no term being expressed, either side would be at liberty, if it was a loan by payment, if it was a partnership by notice of dissolution, to put an end to this engagement. And those arguments which are adduced to your Lordships by Mr. Cotton to satisfy us, and which seem to have satisfied the courts below, that such could not be the construction of the agreement—because, if it were a temporary arrangement, the money might be called back the next day, or the partnership might be broken up the next day—these arguments really seem to me to have no bearing upon the case whatever, because all parties entering into a contract of partnership (the case is one which is continually occurring before the courts) have, in the first instance, the fullest confidence in each other, and consequently many things are often unprovided for, which, on more mature *reflection, and, [189 perhaps, on the advice of a professional man, would otherwise have been provided for in the contract. Frequently in very large concerns, I believe I may say in some of the very largest concerns in the city of London, partnerships have been entered into without any instrument whatever, and have gone on for years and years, although they might have been determined after the first year of the partnership, because there was no fixed period to which it was limited.

Now the present case cannot be compared to the case of an engagement for a particular adventure, whether an adventure for trading in cotton, or for trading in iron, or the like. Such an adventure is concluded after a certain time in the nature of things—it is wound up, and the profits are ascertained. But with regard to the concern we are discuss-

ing—the management of a music hall—there is no such natural period for its termination. The partnership holds leasehold premises for a long period—thirty-five years—but it is agreed by Mr. Cotton that the plaintiff had no means of compelling the defendant to carry on the business for thirty-five years, or any other period of time. If that had been possible, he might, on the same principle, supposing the partnership had owned a fee simple, have obliged him, and those who came after him, to carry it on forever. Of course nothing of the kind could be done—no person could contemplate anything so unreasonable. The fact of the contracting parties having omitted to specify any time for the duration of the partnership would only have this one result—the partnership would go on probably for a certain length of time, but not perhaps so long as if the parties had thought of stipulating a time,—which they have not done in the present case. However, it has gone on for these three or four years. Now the time has come when the parties can no longer agree, and it is necessary to put an end to it; and the defect of the decrees which we have before us—the decree of the Vice-Chancellor and the decree of the Lords Justices (I say it with the very greatest respect for those authorities)—is, that they indicate no term whatever to the arrangement, whether it be loan or partnership.

And, what I venture to say is a very unusual and extraordinary decree is granted, for it orders certain accounts between the parties to ascertain the profits and loss, without [190] saying anything *as to what is to be done for the future, without terminating the contract between the parties. I remember in old times it was held by Sir John Leach that a bill was demurrable which prayed for accounts of a partnership, without praying for a dissolution of it. That has been modified in some recent cases, but the principle was, that when a partnership deed not specifying a term is brought before the court,—unless there were some very unusual circumstances in the case, or some unusual contracts had been entered into,—in the ordinary state of partnership affairs the accounts should be wound up and the transaction settled once for all. In winding up a transaction of this kind with regard to ascertaining profits, I apprehend that, whichever way the decision had gone, it would have been necessary to do that which my noble and learned friend on the woolsack has indicated; because when you come to terminate a matter of this kind, the case is different from what has been going on during previous years. During previous years the person who was entitled to a one-eighth

share has been content, and must perforce have been content, to take the profits as settled by those who are engaged in carrying on the business of the partnership, whether that amount would really prove to be the full amount of the profits or not, the profits in each year depending, of course, upon the stock-taking and the value of the stock taken in each year. But when you wish to bring the matter to a termination, there is no reason why the person wishing to have his share of the profits should be content with taking the amount of profits in that way, as it may have been declared by the managing partner for himself and the others who have been engaged with him in the partnership. The plaintiff says: "I want now to have the whole thing wound up, and to ascertain what at this moment is the total amount of the profits made by this concern since I became engaged with you in it." In order to do that, whichever view is taken, whether it was a loan to be compensated by a one-eighth share of the profits, or a partnership, the profits of which were to be divided, in either case the valuation proposed is necessary.

I think, my Lords, that the valuation proposed is all that under the circumstances of this case the plaintiff is entitled to ask. I do not think he is entitled, under the engagement he has entered *into, to ask for a sale of the concern, regard being had to the amount of his interest in it and to the nature and character of that concern, which of course the Court of Chancery is always bound to look to, and the injury that might result from having a sale of a business of such a description as this is. Under these circumstances it is quite competent for the court to direct such a course of proceeding as has been sketched out by my noble and learned friend in the decree which is proposed now to be made by your Lordships; and I concur in that decree, both in the shape in which it is drawn up, and in the principles which my noble and learned friend on the woolsack has enunciated as the grounds of his decision.

LORD O'HAGAN: My Lords, I concur entirely in the conclusion at which my noble and learned friends have arrived, and I do not propose to occupy your Lordships' time unnecessarily by going over the reasons which seem to me to justify that conclusion. I will, however, say that I had in the course of the argument considerable doubt, for a time, whether, on the grounds of the indefiniteness of the agreement in this case, and some indications of mutual mistake between the parties to it, which were forcibly pressed on our attention by Mr. Pearson, it is properly the subject of

intervention by a court of equity. But I agree with my noble and learned friend who last addressed your Lordships that it behooves us, if possible, to deal with the matter effectively, and prevent the necessity of farther litigation. I think the reasons suggested by Mr. Cotton warrant us in doing so; and, construing the document according to the fair interpretation of its terms and with reference to the circumstances on which it originated, but not with reference to mere parol statements, which, though much urged in argument, cannot legitimately help us to understand it, I am of opinion the solution of the difficulties proposed by my noble and learned friend, the Lord Chancellor, may be properly accepted by your Lordships. I do not say that, to my mind, that solution is entirely satisfactory, and I cannot fail to adopt it with some hesitation when I find it in conflict with the judgments of the learned judges of the courts below, which, however, are also materially in conflict with each other.

192] *The agreement, drafted by an unskilled hand and marked by much obscurity, may be differently regarded by different minds, and whether it imports a partnership, or a loan, or some *tertium quid* partaking of the character of both, as seems to have been indicated in one of the judgments, we can scarcely, perhaps, determine with perfect clearness. But having regard to the express undertaking "to execute a deed of copartnership," it seems reasonable to hold, with the Vice-Chancellor, that the plaintiff and the defendant Syers were constituted partners, at least as between themselves, although their subsequent reference to the act of the 28 & 29 Vict. c. 86, shows that they meant their partnership to be peculiar in its nature and limited in its extent. And if they were partners, their relations as such, not binding them to each other for any definite period, may fairly be taken to have been dissoluble at will, and to have been effectually dissolved, as has been shown already by my noble and learned friends. In whatever light the transaction may be regarded, as constituting partnership or loan of a special kind, I concur with them in rejecting as unreasonable a construction which would give, in consideration of the sum advanced, an interest in a business, such as we are dealing with, of indefinite duration, incapable of being terminated at any ascertainable period, and difficult, if not impossible, to be maintained in the various probable contingencies which have been pointed at in the progress of the discussion.

On the whole, I repeat that I think the proposed solution

of the difficulties of the case is the most acceptable, as being most in accordance with the language of the parties, and best calculated to do justice to both; and I concur in the suggestions of my noble and learned friend on the woolsack, as well with reference to the form of the decree as to the costs of the proceedings.

The following Order was afterwards entered on the Journals:

That the order of the Lords Justices of the 7th of May, 1875, be reversed; and it is hereby declared, that under the terms of the letter of the 8th of June, 1869, the respondent Daniel Backhouse Syers became entitled, as a partner with the appellant, to one-eighth share of the Oxford Music Hall and *Tavern, in the pleadings mentioned, and of [193 the profits thereof, and that the partnership between them was dissolved at and from the 21st of February, 1873 (the time of filing the answer of the appellant), and that the sum of £250 mentioned in the said letter is to be taken as capital brought by the said respondent Daniel Backhouse Syers into the partnership; and it is farther Ordered and Directed,—

- 1°. That an account be taken of the receipts and payments of and respecting the said music hall and tavern, and of the gains and profits thereof exhibited by the account so to be taken, from the 8th of June, 1869, down to the 21st of February, 1873, and of what is coming to the respondent Daniel Backhouse Syers for and in respect of his one-eighth part thereof, having regard to what he has already received on account.
- 2°. That an inquiry be made what sum would, on the 21st of February, 1873, have represented the respondent Daniel Backhouse Syers' one-eighth share in the value of the said music hall and tavern if it had been then sold as a going concern, after deducting all charges thereon, and all liabilities of the business.
- 3°. That on payment by the appellant to the respondent Daniel Backhouse Syers, within a time to be fixed by the judge in Chambers, of the sum coming to him under the heads Nos. 1° and 2°, together with interest at 5 per cent. per annum from the 21st of Febru-

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ary, 1873, till payment on the sum coming to him under head No. 2°, no farther accounts be taken.

194] 4°. That the appellant do pay the costs up to *and including the hearing before the Vice-Chancellor; the costs of the accounts to be in the discretion of the judge in Chambers.

5°. If the payments specified in No. 3° are not made by the appellant, that the said music hall and tavern be sold as a going concern, and that a division of the assets of the partnership be made in the usual way, with liberty to apply in Chambers as to the mode of carrying this direction into effect:

And Ordered, that the appellant do pay or cause to be paid to the respondent Edward Louis Paraire, the costs incurred by him in respect of the appeal, the amount thereof to be certified by the Clerk of the Parliaments: and that the cause be remitted to the Chancery Division to do therein as shall be just, and consistent with this declaration, these directions, and this judgment.

Lords' Journal, 29th February, 1876.

Solicitor for the appellant: *W. Millman*.

Solicitors for the respondent: *Barton & Pearman*.

[Law Reports, 1 Appeal Cases, 195.]

H.L. (E.), March 2, 1876.

[HOUSE OF LORDS.]

195] *JOHN NANSON and JOHN DIXON, Executors, Appellants; and WILLIAM BONNALLIE GORDON, Respondent (').

Bankruptcy—Proof by Partner against Partnership.

It is the settled rule in bankruptcy that a partner cannot prove, under a joint commission against his firm, in competition with the creditors of the firm.

And this rule applies in a case where the partner had died before the bankruptcy, his share had been taken by the other partners under the provisions of the partnership deed, and the money due in respect of it had not been paid to his executors at the time of the bankruptcy.

ON the 24th of November, 1874, the Lords Justices, sitting as the Court of Appeal in Bankruptcy, reversed an order previously made, on the 27th of July, 1874, by the

(') Affirming 11 Eng. Rep., 513.

Chief Judge in Bankruptcy, which had allowed the present appellants to prove as creditors under a liquidation of the estate of Peter James Dixon, John Dixon and Joseph Forster⁽¹⁾.

In the year 1858 Peter Dixon, Peter James Dixon, Robert Stordy Dixon, John Dixon and Joseph Forster carried on business at Manchester and Carlisle in copartnership as cotton spinners, under the style of Peter Dixon & Sons.

By the copartnership deed twenty shares of the business belonged to Peter Dixon. Upon the 1st of July in each year a general account was to be taken of the assets of the firm, and the valuation then made was to be written into two books, to be signed by each partner and to be binding on all. The 32d article provided: "That in case any partner shall retire from the firm under the provision hereinbefore contained, or shall depart this life without having made a valid bequest of his shares in the firm, the shares of such retiring or deceased partner shall be taken by the continuing or surviving partners at their value, *according to [196 the stock-taking of the 1st of July immediately preceding such retirement or death, with interest at £5 per cent. per annum on the amount of such value, in lieu of profits, from such 1st day of July up to and inclusive of the day of such retirement or death."

The 33d article declared that the amount due to such retiring or deceased partner, after deducting all sums received by him since the previous 1st of July, and also all moneys (if any) due by him to the firm, should be paid by the continuing partners to him, or to his executors, by fourteen equal annual instalments, with interest on each at £5 per cent. per annum. But the continuing partners were to be entitled to pay off "the balance for the time being due to the retiring partner, or the executors of a deceased partner," on giving twelve months notice.

The 35th article enabled any partner, in his lifetime, without any consent of the others, to transfer all or any of his shares to one or more of his sons or brothers.

The 36th article provided that if any partners retired, or died, and the continuing partners refused to take his share as before mentioned, the capital should be sold or converted into money immediately.

Peter Dixon died on the 28th of April, 1866 (having previously appointed the present appellants his executors), but the business was continued by the other partners until the 1st of July, 1868. The value of his shares was calculated

⁽¹⁾ *In re Dixon, Ex parte Gordon*, Law Rep., 10 Ch. Ap., 160.

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at the stock-taking on the 1st of July, 1866, and was ascertained to amount to £33,262 17s. 4d. His affairs became the subject of an administration suit in the Court of Chancery.

Robert Stordy Dixon retired from the firm on the 1st of July, 1868.

On the 11th of July, 1872, the remaining partners—Peter James Dixon, John Dixon and Joseph Forster—presented a petition for liquidation under the Bankruptcy Act, 1869; and at a meeting of creditors, Mr. Bonnallie Gordon, banker, of Carlisle, was appointed trustee under the liquidation.

Mr. Nanson and the other executor of Peter Dixon presented a petition praying to be allowed to prove against the assets of the firm for the sum of £36,000, principal and [197] interest, as due to the *testator's estate. At first the trustee assented, but on the 23d of June, 1874, made an application to the county court of Cumberland, sitting at Carlisle, to expunge this proof, and it was ordered to be expunged. Upon appeal to the Chief Judge in Bankruptcy, this order was reversed. On appeal to the Lords Justices the order of the county court judge was restored (*). This appeal was then brought, and the proof was directed to be expunged.

Mr. A. G. Martin, Q.C., and Mr. F. Hoare Coll, for the appellants: This case does not fall within that rule of the bankrupt law which forbids one member of a partnership to prove against the partnership his own particular claims in competition with the claims of the general creditors. In the first place this is not an ordinary partnership debt; it did not arise in the course of the trading; it is a debt created under the special provisions of a deed, and, on examination of the terms of that deed, appears to be a claim in respect of a purchase made by the partnership of the deceased's share in the assets and the profits.

In the next place, if a different construction should be put upon the transaction, it is submitted that the rule which may apply to a partner, should he attempt to prove his particular claim against the general partnership, cannot apply when his executors, who, as such, are not and cannot be partners, claim to prove in respect of his general assets. In *Ex parte Westcott* (*) such a proof was allowed; and though it might be said that the proof there allowed was in respect of a *devastavit*, still that shows that the court recognized the distinction which might exist between the case of

(*) Law Rep., 10 Ch. Ap., 160, 161, n.

(?) Law Rep., 9 Ch. Ap., 626.

executors, who had a duty to perform to others, and that of the man himself, who was merely attempting to enforce his own claims, which might be rightfully affected by his own personal liabilities. Taking the general principle to be that, in respect of dealings between two partners, proof of the claim of one on the other could not be admitted while the general partnership debts remained unsatisfied, that would not affect this case, for here there was no dealing of that sort, but the claim arose after the partnership had been terminated by the death of Peter Dixon, and *was a [198 claim made by third persons in respect of a sale of part of his property. *Ex parte Hargreaves* ('), therefore, did not apply, for there the two partnerships and their mutual debts and credits were running on together. The articles of the partnership deed here were almost identical with those in *Vyse v. Foster* ('), which this House declared to constitute a contract for the sale of the testator's share to his partners; and, that being so, the transaction could not be treated as a mere debt, *inter se*, of the partners themselves, but was a substantive debt, having no relation to the partnership character of the creditor, but was a debt due to the executors as on a sale by them of part of the property of their testator. A dormant partner, who had dissolved partnership and had afterwards obtained a cognovit from his late partner for what was due to him on the balance of accounts, has been held entitled to prove the amount of his claim, though some of the partnership debts were unpaid: *Ex parte Grazebrook* ('). In *Ex parte Carter* (') the claim was in respect of money which Godwin had himself advanced to the firm, and which he, as one of the partners, employed while he was alive and acting in the business of the firm, and after his death things went on as before, and the name of Godwin had been used to the last by the firm, and used with the consent of his executors, so that his estate itself continued in the partnership and formed part of the partnership assets. Lord Eldon, in his judgment, expressly referred to that fact (') as strongly affecting the case. That was not so here. In the case of *Moore* (') proof by one partner against the estate of the other was refused, but there the party claiming was really in the position of a surety who had not discharged his liability as such, and his undertaking to indemnify the joint estate was held not to be sufficient. The indemnity was treated by Lord Eldon as of no consequence. These

(1) 1 Cox, 440.

(2) Law Rep., 7 H. L., 318.

(3) 2 D. & Ch., 186.

(4) 2 Gly. & J., 233.

(5) 2 Gly. & J., 239.

(6) Ibid., 166.

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two cases were therefore not applicable here, for here the debt arose after the death of the testator.

The two cases of *Ex parte Collinge* ⁽¹⁾ and *Ex parte Topping* ⁽²⁾ showed that the application of the rule of bank-
[199] ruptcy relied on *here was one within the discretion of the court, and the present was certainly a case in which that discretion ought to be exercised in favor of the executors. And those cases could not here be used in support of this decree, for the persons there concerned were themselves the parties to the original transactions, and were not clothed with a representative character entitling them to claim in a representative right. In the latter of these cases Lord Westbury mentioned ⁽³⁾ the case where "the debt sought to be proved by the partner against his copartner is a debt arising from an undisputed contract apart from the copartnership, and which was in existence at the time of the adjudication in bankruptcy," as one where the rule might properly be relaxed. This is surely a case falling exactly within that description. In *Ex parte Edmonds* ⁽⁴⁾, which resembled this case, the executors of the deceased partner were held entitled to prove *pari passu* with the other creditors, and to receive dividends on an unpaid balance of their testator's money, though it had not been withdrawn from the partnership, but simply allowed to remain there, being secured only by a bond given to the executors by the surviving partners.

There was here no continuing joint estate of the original firm of which Peter Dixon had been a member, there was only the joint estate of the new firm, of which the executors were creditors as for property sold. The executors here could in no way be treated as having anything to do with the firm itself, except merely as being its creditors. In *Ex parte St. Barbe* ⁽⁵⁾, where there were two partners who were engaged, individually, in other concerns, it was held that as these other concerns were distinct from each other, there might be a proof by one on the bankruptcy of the other, the rule in bankruptcy applying only where the two businesses were but branches of one joint concern. So that there were several exceptions to the rule now asserted, exceptions rendered necessary by peculiar circumstances. Such circumstances existed here. The present case fell within the principle of these exceptions, and the joint creditors could not suffer from the claim now made, for the more

⁽¹⁾ 4 De G. J. & S., 533.

⁽⁴⁾ 4 De G. F. & J., 488.

⁽²⁾ *Ibid.*, 551.

⁽⁵⁾ 11 Ves., 413.

⁽³⁾ 4 De G. J. & S., at p. 557.

the estate of Peter Dixon was increased the greater would *be the amount which they could obtain from it, as [200 the estate of one liable to the debts of the joint partnership.

Mr. *De Gez*, Q.C., and Mr. *Davey*, Q.C., for the respondent: The rule of bankruptcy law is clear, and this case affords no ground for exception to it. The cases of *Ex parte Sillitoe* (*) and *Ex parte Carter* (*) state the principle distinctly. In the first of these cases Lord Eldon thus expressed himself (*): "The rule is that a partner in a firm against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm, who are in fact his own creditors, and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself." His Lordship admitted that there might be an exception to the rule, and mentioned there the case of *Ex parte Kendal* (*), where he said the partner became a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership. There was nothing of that kind here. And referring to *St. Barbe* (*), it was shown that to make, in any case of that sort, proof under a joint commission admissible, the two trades must be really and entirely distinct from each other. Here there was but one firm, not two distinct firms, and the funds of the deceased remained in his firm in precisely the same manner as they had stood there before his death. Under circumstances such as exist here the proof cannot be admitted: *Ex parte Adams* (*). The rule now contended for was clearly stated in *Ex parte Ellis* (*), and was acted upon by the Lords Justices recently in *Ex parte Bass* (*).

It made no difference that the joint creditors might ultimately come upon the individual estate of Peter Dixon if this claim should be allowed. It is the settled rule of bankruptcy that the fund for payment of the joint creditors must not be affected by contingencies. *And here [201 there can be no doubt that there would not be, in fact, any thing of which they could avail themselves if this proof should be allowed. Lindley on Partnership (*) was also referred to.

Mr. *Marten* replied.

(1) 1 Gl. & J., 374.

(2) 2 Gl. & J., 233.

(3) 1 Gl. & J., 382.

(4) Referred to in *Ex parte Sillitoe*, 1 Gl. & J., at p. 382, as reported in 1 Rose, 71. This reference must be a mistake. The case was probably *Lodge* and *Fendal*, 1 Ves. Jun., 166, 167, to which Lord El-

don correctly referred in *Ex parte Harris*, 2 Ves. & B., at p. 218, and *Ex parte Yonge*, 3 Ves. & B., 34.

(5) 11 Ves., 414.

(6) 1 Rose, 305.

(7) 2 Gl. & J., 312.

(8) 36 L. J. (N.S.) (Bankcy.), 39.

(9) 3d ed., p. 1227.

THE LORD CHANCELLOR (Lord Cairns): My Lords, it appears to me, that the question which is submitted to your Lordships on appeal in this case is entirely covered by authority—by authority which has ranged over a great number of years, and has, indeed, become a leading principle in the administration of the law of bankruptcy. The statement of the general principle may be taken from a number of cases; but I may conveniently refer to the enunciation of it by Lord Eldon in the case of *Ex parte Sillitoe* (¹): “A partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firm who are in fact his own creditors, and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself.”

My Lords, what are the facts of the present case so far as they are material? There is a gentleman of the name of Peter Dixon, in business with certain other partners; he dies, and, according to the contract of partnership, upon the occurrence of the death of a partner, his share in the assets is to be taken as it stood in the books of the concern on the 1st of the previous July; it is to be paid out by instalments ranging, I think, over fourteen years, and the surviving partners are to continue the business, paying out his capital in that way. Accordingly, the share of this partner was taken as it stood in the books of the concern, and it fell to be paid out by instalments as had been agreed upon. Before it was paid out the surviving and continuing partners became bankrupt. This transaction has been called a purchase and a sale, and has been treated as if it were something altogether independent of the partnership. My Lords, it is impossible to disguise the transaction by applying to it terms of that kind. It was a mode by which, for 202] *the obvious convenience of all parties, it was arranged that upon the death of a partner his share in the assets should be paid out to him, in certain instalments of money, in place of the concern being broken up and liquidated by a sale, and he was a creditor of the continuing partners for the amount of his interest in the concern thus ascertained.

My Lords, the continuing partners, as I have said, became bankrupt. But before they became bankrupt, Dixon himself died, and his estate came to be administered in the Court of Chancery, and is now being administered there. A large amount of debt which existed against the firm at the time when Dixon died, is still unpaid, and the creditors entitled to those debts have proved those debts in the adminis-

(¹) 1 Gl. & J., 374.

tration in the Court of Chancery. Now, these debts of course have to be paid by the estate of Dixon, but they are also debts in the bankruptcy against the continuing partners, and, there being no joint estate, that is to say, no joint estate belonging to the firm as it was originally constituted, these debts will have to be paid out of the only estate in the bankruptcy, namely, the joint estate of those who were partners at the time of the bankruptcy. Your Lordships have therefore a case in which the estate of the deceased partner, Dixon, is liable to pay to these creditors that I have mentioned the amount of their debts, and those creditors are at the same time entitled to come upon the fund in bankruptcy, to have their debts paid out of that fund; and just in proportion as the estate of the deceased, Dixon, will carry away a portion of that fund for the payment of the debt due to him, in that proportion the fund which would be available for the payment of those creditors in the bankruptcy will be lessened.

Now, it is said that although it may appear at first sight to be a diminution, by the estate of Dixon, of the fund that would be paid to these creditors in the bankruptcy, that is to say, would be paid to those persons in the bankruptcy who are besides creditors of himself, still in reality they will benefit and not suffer by that arrangement, because inasmuch as they are the whole, or almost the whole, of the creditors against his estate the dividend will be brought into his estate, and they will have the benefit of it there. My Lords, that is an accident. There *might have been [203 separate creditors of Dixon to the amount of hundreds of thousands of pounds, in which case the process that I have described in place of being beneficial to his creditors who were creditors at the time that he was in business, would have been in the highest degree injurious to them. And I think your Lordships have not heard any authority cited in which the court has entered into an investigation of how the general rule enunciated by Lord Eldon in *Ex parte Sil-litoe* (¹) will apply in a particular case. Indeed, in a case which came before the Lords Justices, *Ex parte Bass* (²), it was expressly stated that it was not the habit of the court, and would not be right in the court, to investigate what might be called the outcome of the accounts, in order to determine, *a priori*, whether the rule ought or ought not to be applied.

Then, my Lords, it is contended, and this really has been the great topic of argument before your Lordships, that although

(¹) 1 Gl. & J., 874.

(²) 36 L. J (N.S.), Bankcy., 89.

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the rule mentioned by Lord Eldon in *Ex parte Sillitoe* (*), and applied in so many other cases, exists where the person who seeks to prove against the estate in the bankruptcy is a living person, that rule does not apply where he has died, and where it is not himself but his estate which is coming and seeking to prove against the estate in the bankruptcy. If there was no authority upon that point, I should have said that it would be in the highest degree unreasonable and irrational to hold that if a trader had retired from a partnership, and that partnership became bankrupt, he, the trader, should not prove in competition with creditors so long as he lived, but that the moment he died his executors could do what he himself could not have done, and come in and prove in competition with the creditors; that is to say, that the firm in which he was a partner having become bankrupt he would be unable, we will say, for one month after the bankruptcy, to prove in competition with the creditors, but if he should die on the last day of the month, that then his executors, as soon as they had proved his will, might at once come in and do the very thing that he could not have done. Could anything more whimsical, more capricious, or more irrational, be supposed? If the 204] reason is that the hand to pay *should not prove in competition with those who are to receive, then whether that hand to pay is the living hand of the man himself, or is the deputed hand of his executors, is utterly immaterial.

But, my Lords, is there any authority upon the subject? The case of *Ex parte Carter* (†) is express upon the point. Lord Eldon there admitted no distinction of this kind whatever, although he had before him the case of executors. He treated the case of executors exactly as if it had been the case of the person to whom they were executors. Is there any authority produced in the opposite direction? There is none; and I apprehend that to make a distinction upon a ground so unsubstantial, so unreal, so irrational, would be a course which your Lordships would be slow to adopt.

My Lords, I am bound to say that I concur entirely with the judgment delivered by the Lords Justices, and I submit to your Lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD: My Lords, the sole question to be determined is, whether the rule that a partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firm applies to this case.

(*) 1 Gl. & J., 374.

(†) 2 Gl. & J., 233.

Under the will of Peter Dixon his executors allowed his share in the partnership to continue in the business, and the amount of it became a debt due to his estate from the continuing partners, as said by Lord Eldon in *Ex parte Carter* (*). At the time of the petition for liquidation being presented by the continuing partners, there were unpaid debts to the amount of £27,000, which were contracted by the firm while Peter Dixon was a member of it, and consequently for which his estate was liable. The debt claimed of the executors was in fact incurred by the continuing partners under the terms of the partnership deed, which provides that in case any partner should die without having made a valid bequest of his share, the share of such deceased partner should be taken *at its value, and the amount [205 found due should be paid in a certain manner.

If there had been no actual bequest of Peter Dixon's share in the partnership, the value of it would have gone to his executors as a debt from the continuing partners to his estate. And the actual bequest does not vary, but confirms the relation between the parties. The position of the executors in their representative capacity is exactly similar to that of their testator. They are liable in respect of the estate to the creditors for debts incurred by the firm while Peter Dixon was a partner, and they are creditors of the firm in respect of the debt due to their testator for his share in the partnership. Therefore there can be no difference between the case of the partner himself and of his executors. They are equally within the range of the principle that a man shall not come into competition with his own creditors.

This conclusion seems to me to be supported by those authorities which are directly applicable to the circumstances of the present case, and is not to be shaken by cases on the other side which were decided upon the ground of not being at all within the rule, as in *Ex parte Westcott* (†); or of being exceptions to it, as in *Ex parte Kendal*, mentioned by Lord Chancellor Eldon in *Ex parte Sillitoe* (*).

Under these circumstances, my Lords, I agree with my noble and learned friend, that the order appealed from ought to be affirmed.

LORD HATHERLEY: My Lords, I entirely concur in the conclusion at which my noble and learned friends have arrived in this case. It appears to me that to decide otherwise than as the Lords Justices did, when the case was before them, would be to overthrow a rule which seems to

(*) 2 Gl. & J., 233.

(†) Law Rep., 9 Ch. Ap., 626.

(*) 1 Gl. & J., 382. See n. (4), ante, p. 200.

have been settled at least some eighty years ago, and to have been acted upon ever since with certain exceptions, which I agree with the learned counsel in saying, only tend to confirm the established rule.

206] That rule is a simple one, and founded in justice in every respect, although there may be particular cases and occasions, as must be the case with regard to the general administration of assets, in which it may operate so as to involve hardship as regards the individual against whom it is applied. I do not, however, think myself that anything of that kind occurs here. The rule is, that all the assets of a trading firm are first to be dealt with to satisfy the creditors of that firm, following those assets through all their devolutions, with only certain regulations as between the different classes of creditors affecting those assets, as they may happen to be found at the time of the bankruptcy, the time when it becomes necessary to adjudicate upon the fund. Those assets are to be so applied before a person who has been a partner in the firm, and who is liable in respect of the dealings of that firm, can receive anything in respect of principal, or (for Lord Eldon said he could see no difference at all which would justify him in making a distinction) in respect of being interested as a creditor before the time of distribution. This is laid down in *Ex parte Sillitoe* (') that the funds should be so applied that no partner should be allowed to take anything so long as a single creditor remains unpaid either as to his principal or his interest.

The foundation of the rule seems to me a rational and a just one, and when we come to apply it to this particular case it is immaterial whether it applies to a deceased person, or the executors of a deceased person. No shadow of a distinction can be drawn, it seems to me, between the position of that deceased person the day before his death and the position of his executors immediately afterwards. To allow executors to draw out of the fund a dividend in respect of a debt due to their testator, a quondam partner in the business, and a debtor as well as the surviving partners to the creditors of the firm, would be to establish a distinction without there being the least shadow of a difference, and to run counter to the principle which occasioned the rule, and which I have just stated. Some exceptions have been made to that rule; one was the case of a breach of trust on the part of executors, and another was the case of separate firms, which had clearly got a distinct and

(') 1 G.L. & J., 374.

*separate basis to stand upon—it was entirely confined [207 to trade transactions between the two firms—not money transactions, such as a loan from one firm to the other. The exceptions being confined to cases of that description, tend very strongly to confirm and corroborate the rule, a rule which has never heretofore been departed from, and which it would ill become this House after a long series of decisions now to depart from, unless it can be shown that the rule had been established on a false principle, which in the present argument has not in any way been shown.

LORD O'HAGAN: My Lords, your Lordships are asked by the appellants to set aside a well-established rule, supported by a series of decisions of the highest authority, which are not really encountered by a single decision on the other side, and without any special grounds of reason or justice to induce your departure from it in this particular case. The admission by the learned counsel, that the estate of Peter Dixon continues liable for the joint debts of the partnership, appeared to me to bring it at once within the operation of the principle which forbids a partner to prove in competition with the creditors of his firm, who are, as Lord Eldon has said, "his own creditors," so as to diminish the funds available for their benefit.

Very ingenious efforts have been made, but, in my opinion, vainly, to distinguish this case from *Ex parte Carter* (*), and *Ex parte Collinge* (*), which are precisely in point, and distinctly applicable to the circumstances presented to your Lordships. They are sustained strongly by *Ex parte Bass* (*) and other cases, and *Ex parte Topping* (*) and *Ex parte Westcott* (*) alone relied on for the appellants, when rightly understood, are quite consistent with them.

The death of Dixon appears to me to be immaterial for the purposes of your Lordships' decision. Executors, who represent their testator in such a case as this, stand in his place *quoad* a *debt which was his during his life- [208 time, having the rights which he would have possessed, and affected by the disqualification to which he would have been subject, had he continued to exist. And so Lord Eldon held in *Ex parte Carter* (*).

I think it also immaterial whether the claim sought to be proved by the partner is a definitively-ascertained debt, or a debt merely ascertainable; and I see no reason for holding

(1) 2 Gl. & J., 233.

(2) 4 De G. J. & S., 533.

(3) 36 L. J. (N.S.), (Bankcy.), 39.

(4) 4 De G. J. & S., 551.

(5) Law Rep., 9 Ch. Ap., 626.

(6) 2 Gl. & J., 233.

that, the demand of the executors being for money lent, they are on that account enabled to evade the rule, which, in my view of it, forbids them to prove in competition with the creditors of their testator.

These were the chief grounds of the argument for the appellants. In my opinion it failed on both of them; and this being so, I content myself by saying that I think your Lordships have been well advised to refuse to disturb a rule of law so long in operation, having such high sanction, and apparently so equitable in itself and so beneficial to the public interests. I think that the proof should be disallowed, the judgment of the Lords Justices affirmed, and the appeal dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 2d March, 1876.

Solicitors for the appellant: *Pattison, Wigg & Co.*

Solicitors for the respondent: *James, Curtis & James.*

See 11 Eng. Rep., 513 note.

[Law Reports, 1 Appeal Cases, 209.]

H.L. (E.), July 1, 1875. Feb. 25; March 30, 1876.

[HOUSE OF LORDS.]

209] *WILLIAM ALLISON, Appellant; and THE BRISTOL MARINE INSURANCE COMPANY (LIMITED) and Others, Respondents (¹).

Policy on Freight—Prepayment.

Shipowner and charterer may agree, by the terms of a charterparty, that a portion of the stipulated freight shall be prepaid: and such prepayment will not affect its legal character of freight; the remainder may be the subject of insurance by the shipowner.

A ship was chartered to sail from Greenock to Bombay, to carry a cargo of coals. Freight was to be paid on unloading and right delivery of the cargo at and after the rate of 42s. per ton of 20 cwts. on the quantity delivered. It was provided that "such freight is to be paid, say one half in cash on signing bills of lading less four months' interest at bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on London at six months' sight." Half of the estimated amount of the freight was paid in London. The shipowner effected two insurances, one for £500 "on freight valued at £2,000," the other for £700 "on freight payable abroad valued at £2,000." The ship was lost before entering Bombay harbor, but one half of the cargo was saved and delivered. The master, in the belief that the prepayment had satisfied the freight on this half so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight:

(¹) Reversing 10 Eng. Rep., 300.

Held, that on the proper construction of the policy the whole sum agreed upon constituted freight; that half of the whole sum of that freight had been paid in England; that it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; that half of the whole remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea, and that the shipowner was entitled on his policies on freight to recover as for the total loss of that half.

The *dictum* of Lord Kingsdown in *Kirchner v. Venus* (1) considered and explained.

THIS was an appeal under the Common Law Procedure Act, 1864. The plaintiff Allison was the owner of a ship called the Merchant *Prince, belonging to the port of [210] Glasgow. On the 7th of March, 1867, the plaintiff chartered this ship to Mr. De Mattos of London, for a voyage from Glasgow to Bombay with a cargo of coals. The material parts of the charterparty were those which related to the payment of freight, and they were in the following terms:

"The freight to be paid on unloading and right delivery of the cargo at and after the rate of 42s. sterling per ton of 20 cwts., on the quantity delivered, in full of all port charges, pilotages, Bute Dock wharfage, harbor dues on cargo, and Dover and Ramsgate dues, as customary, and such freight is to be paid, say, one half in cash on signing bills of lading, less four months' interest at bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on the gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, agreeably to bills of lading, less cost of coal short delivered, in cash, at current prices of exchange for bills on London at six months' sight. . . . The vessel to be addressed to the freighter's agent free of commission."

On the 13th of April, 1867, the plaintiff effected with the defendants an insurance for £500 "on freight valued at £2,000."

On the 15th of April the master signed bills of lading acknowledging the delivery on board of 2,178 tons of coal.

On the same day the plaintiff gave the following receipt, indorsed on the bill of lading, acknowledging the payment of half the stipulated freight:

"Received from W. N. De Mattos, Esq., the sum of £2,286 18s. sterling, being advance of half freight on within shipment, the owner having paid all charges, including consignment commission at Bombay, as per charterparty."

On the 23d of April the plaintiff effected with the defendants another insurance for £700 "on freight payable abroad valued at £2,000." He also effected two other policies with

(1) 12 Moo. P. C., 361.

other insurers, bringing the whole amount of freight insured up to £2,000, which was the sum he expected to receive on delivery of the full cargo.

On the 20th of April De Mattos effected, on his own behalf, an insurance on the cargo of the Merchant Prince for the 211] said voyage. *The policy stated it to be "on 2,178 tons of coals, and increased value thereof, by prepayment of freight, valued at £4,500."

On the 27th of April, 1867, the ship left Greenock for Bombay. On the 8th of August it struck on a reef called Chaoul Kadee Reef, about eight miles from Bombay, and there became a total wreck. About 1,050 tons of coals were saved and landed at Bombay, and there sold. No charge for freight was made at Bombay in respect of this half of the cargo actually delivered, the master treating that part of the cargo as constituting the half on which the freight had already been paid in England. The plaintiff claimed as for a total loss of the half of the freight thus left unpaid.

The plaintiff brought his action on the two policies. The first count of the declaration was on the policy for £700 on "freight payable abroad;" the second count on the policy for £500. There were the usual money counts.

The defendants pleaded as to both counts, except as to £250, payment into court of £440, and as to the £250 payment, and as to the money counts never indebted.

The cause was tried before Mr. Justice Brett in December, 1872, when by consent a verdict was taken for the plaintiff for the damages in the declaration, subject to leave for the defendants to move to enter the verdict for them, or to reduce the damages. A rule for that purpose having been obtained in the Court of Common Pleas, the case was there argued, and Lord Chief Justice Bovill, Mr. Justice Brett, and Mr. Justice Grove were of opinion that the plaintiff was entitled to claim as for a total loss, and discharged the rule. The case was taken on appeal to the Court of Exchequer Chamber, where Mr. Baron Cleasby and Mr. Baron Pollock were for affirming the judgment, but Lord Chief Justice Cockburn, Mr. Justice Mellor, and Mr. Baron Amphlett were for reversing it (1). It was accordingly reversed, and this appeal was then brought.

The judges were summoned, and the Lord Chief Baron Kelly, Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Brett, Mr. Justice Grove, and Mr. Baron Pollock, attended.

212] *Mr. *Watkin Williams*, Q.C., and Mr. *J. A. McLeod*

(1) Law Rep., 9 C. P., 559.

(Mr. *Cohen*, Q.C. was with them), for the appellant: The policies cover the freight, which had to be earned, and which could only be earned on right delivery of the cargo. That was the freight on one half of the cargo. The freight as settled by this charterparty was divided into two lump sums, one was to be paid here, and was paid here; the other was to be paid at Bombay. As only one half the cargo was delivered at Bombay, and the payment of freight was to be on right delivery of the cargo, the half cargo delivered was properly treated as the half on which the freight had been paid in England; the other half of the cargo not being delivered at all, no freight could be demanded for it. The freight on it was lost, and that was the freight in respect of which the plaintiff had effected his insurances, and on them he is entitled to recover as for a total loss.

The money paid in London was not a loan, but a prepayment of half the freight. It could not have been recovered back: *De Silvale v. Kendall* (*). It was distinctly declared in the charterparty itself to be freight, and the facts of this case do not allow it to be brought within the dictum of Lord Kingsdown in *Kirchner v. Venus* (*), the circumstances of the two cases being entirely different. Wages would be due on the part so prepaid, as if the ship had safely arrived in the delivery port: *Anonymous* (*). In *The Karnak* (*) it was held that the question, whether an advance of money was to be treated as a loan or as a prepayment of freight, must depend on the instruments executed between the parties, and that decision was in accordance with the previous case of *Hicks v. Shield* (*).

The insurable risk which the plaintiff had was the one-half of the whole amount of the cargo which had to be earned—that one-half was lost. He had nothing to do with insuring the other half that had been paid, which, being a sum that might be lost, for it could never be recovered back from the shipowner, the charterer had good title to insure, but what the charterer did in that manner can in no way affect the rights of the plaintiff upon that *half of the freight [213] which, if the ship had arrived safely, he would have been entitled to receive; which he did not receive, because the ship did not arrive safely, and which, therefore, he is entitled, as a total loss, to recover from the underwriters.

Mr. *C. Russell*, Q.C., and Mr. *Benjamin*, Q.C. (Mr. *Fulleton* was with them), for the respondents: The question

(*) 4 M. & S., 37.

(*) 12 Moo. P. C., 361, at p. 390.

(*) 2 Show., 283.

(*) Law Rep., 2 A. & E., 289.

(*) 7 El. & Bl. 633.

in this case really depends on the construction of the charterparty. The argument on the other side depends for its force on the assumption that the payment in advance is a payment of freight; but that assumption is not warranted by the authorities. The fact that the parties give it that name cannot confer upon it the legal character of freight. Lord Kingsdown, in delivering the judgment of the Privy Council in *Kirchner v. Venus* (¹), states that proposition very fully. He says: "A sum of money payable before the arrival of the ship at her port of discharge, and payable by the shipper of the goods at the port of shipment, does not acquire the legal character of freight, because it is described under that name in a bill of lading, nor does it acquire the legal incidents of freight. It is in effect money to be paid for taking the goods on board and undertaking to carry, and not for carrying them." *Manfield v. Mailland* (²) had already established a similar proposition. In this case the 42s. per ton must be distributed over the whole of the cargo; one-half of that sum had been paid here, and in consequence of that payment there remained but 21s. per ton to be paid. But of the tons sent out, only one-half was delivered, and the loss of freight is that which was suffered in respect of the other half. That was half of the whole, on which whole half had been already paid, reducing the sum to be paid to 21s. the ton on each ton, whether delivered or lost.

If the plaintiff could recover on this claim, the charterer would, by the arrangement between him and the plaintiff, obtain a double advantage; he would obtain back, under his insurance, what he had already paid, and he would have got his half cargo carried for nothing, while nothing had been charged him for freight of what was lost. It could not be the policy of the law to sanction arrangements which would produce such results as these, and convert insurances 214] *from a mode of indemnity against loss into a means of profit from its happening.

[There were many cases cited in illustration on both sides of the argument; they are all referred to in the opinions of the judges or the judgments of the Lords.]

Mr. *Watkin Williams* replied.

THE LORD CHANCELLOR proposed the following question to the judges: Whether, upon the circumstances of the case, there was a total or only a partial loss of the subject-matter of insurance?

The judges requested time to consider. Adjourned.

(¹) 12 Moo. P. C., 361, at p. 390.

(²) 4 B. & Ald., 582.

Feb. 25. LORD CHIEF BARON KELLY: My Lords, I venture to think that some topics have been introduced into the discussions which have taken place in this cause, that are either immaterial altogether or irrelevant. The substance of the whole case is this: The plaintiff, having granted a charterparty of his ship, the Merchant Prince, to carry a cargo of coals from Greenock to Bombay, the freight upon which was estimated at £4,000 and upwards, received under a provision of the charterparty £2,000 and upwards, in advance of the freight; and he insured by policies, before and after the date of the charterparty and advance, "freight payable abroad" valued at £2,000. He had thus secured to himself one-half the freight by the payment in advance; and he secured himself, by thus insuring, the other half (£2,000) by the policies in question. The ship was lost, but one half of the cargo arrived at Bombay, and was landed in safety. The freight on this half was met, in the strict terms of the charterparty, by the advance made at its execution; and the other half freight (the cargo not having reached Bombay) was lost. And the plaintiff now claims the loss as a total loss under the policies. It was only this unpaid half that he insured, and this he has lost; and this I am of opinion is a total loss, and that the plaintiff is entitled to your Lordships' judgment.

*MR. JUSTICE BRETT: My Lords, in this case the ac- [215
tion was brought by the plaintiff, a shipowner, on two policies of insurance to recover an alleged total loss of freight. The first policy described the subject-matter insured as "freight valued at £2,000;" the second described it as "freight, payable abroad, valued at £2,000." The plaintiff claimed for the total loss of freight which he alleged would, if there had been no loss, have been payable to him under a charterparty made between him, as shipowner, and De Mattos, as charterer. By the charterparty, dated the 7th of March, 1867, the ship was to load at Greenock a cargo of coals, and proceed forthwith to Bombay, and there deliver the same. "The freight to be paid on unloading and right delivery of the cargo at and after the rate of 42s. per ton on the quantity delivered," &c.; and "*such freight*" is to be paid, say, one half in cash on signing bills of lading, *less four months' interest*, &c., 5 per cent for insurance, and 2½ per cent. on the gross amount of freight in lieu of consignment at Bombay, and "*the remainder*" on delivery of the cargo agreeably to bills of lading, less cost of coals short delivered, in cash, &c. The vessel to be addressed to the freighter's agent abroad, free of commission—owners to have an abso-

lute lien on the cargo for freight, &c. Under this charterparty, the charterer loaded about 2,000 tons of coal on board the ship, and paid the plaintiff about £2,000. The bills of lading were dated the 15th of April, 1867. A receipt was given by the plaintiff on the same date, indorsed on the bills of lading, for the sum received, in the following terms: "being advance of half freight on within shipment," &c. The dates of the policies sued on were the 13th of April, 1867, and the 22d of April, 1867. There were four policies in all effected by the plaintiff, by which, collectively, the amount insured was £2,000.

Upon the case, as stated, the court had power to draw inferences of fact. Half the cargo was lost, and half was delivered at Bombay. In the Court of Common Pleas, it was argued on behalf of the underwriters that they had a right to treat the policies as insurances of the whole freight to be earned by the ship; because the policies were in general terms "on freight;" and there was no notice of any other than the whole freight. Upon this it was answered on behalf of the plaintiff, and determined by the court, that, as 216] *matter of law, the policy in general terms must be held to take effect, either upon such freight as the assured had at risk on the voyage insured, or as he had at risk and intended to insure, and, as matter of fact by deduction, that, in this case, the insured intended to insure the freight which he supposed he had at risk, namely, about £2,000, the amount which he would have to receive at Bombay if the cargo arrived safely, and which he supposed he would lose if the cargo was lost.

This decision of the Court of Common Pleas was founded on the facts in this case, and on the cases of *Irving v. Richardson* ⁽¹⁾ and *Stephens v. Australasian Insurance Company* ⁽²⁾. Those cases seem to me to justify a decision, that by reason of the general understanding of merchants, which has been sufficiently made known to the courts, it is to be held, as matter of law, without further proof, that wherever the subject-matter of a policy is described in it in general terms, it is to be taken to cover the interest, which is within its terms, which the assured has at risk, unless the contrary appears to have been the intention of the assured from other parts of the policy, or other proof. In this case, if the matter be not of law, it seems to me clear upon the facts that the plaintiff intended to insure, not the whole charterparty freight, but the part which had not been paid to him when the ship sailed, and which he evidently estimated at £2,000.

⁽¹⁾ 2 B. & Ad., 193.

⁽²⁾ Law Rep., 8 C. P., 18.

It will be observed that the judgment of the Court of Exchequer Chamber assumes that this was so, and that this point was not pressed before your Lordships. For it was admitted before your Lordships, in argument, by the counsel for the respondents, that the whole question must ultimately depend upon the construction of the charterparty, whether the shipowner could by virtue of it claim, under the circumstances, anything from the charterer. "I admit (he said) that if he could claim nothing, there was a total loss."

The question, therefore, is, whether upon the proper construction of the charter party, as between the shipowner and charterer, the shipowner could or could not, under the circumstances, have maintained a claim against the charterer for any amount of freight beyond the sum paid to him when the bills of lading were signed. The first observation I will venture to make is, that this *question should [217 be determined upon a consideration of the charterparty alone, that is to say, as if no policy had been effected. And secondly, that the construction of it, as of any other mercantile document, should not be made to depend on its strict grammatical form, or on the apparent meaning of any one phrase in it taken by itself, but on the apparent expressed meaning, as to practical results, of the whole. It should be construed by considering the terms of it, and the decisions in former cases of terms similar, though perhaps not identical. Upon charterparties and bills of lading similarly framed, the disputes found in the books to have been raised have been, whether the money advanced should be treated as a loan or as an advance of freight: if the first, whether it should be deducted from freight, if freight should be earned, or be paid back wholly or in part to the charterer, if no freight, or not a sufficient amount of freight, should be earned by delivery at the port of discharge; if the second, whether if, in fact, paid, it, or any part of it, should be paid back; or, if not paid, whether it could be claimed by the shipowner where, in either case, by perils of the sea, the cargo should not be delivered at the port of discharge.

The first case on the subject, so far as I know, is the *Anonymous Case* ('). "*Advance money paid before, if in part of freight and named so in the charterparty, although the ship be lost before it come to a delivery port, yet wages are due according to the proportion of the freight paid before; for the freighters cannot have their money.*" As the terms of the suggested charterparty are not given,

(') 2 Show., 283.

the case is of little assistance as to the construction of the present charterparty; but it suggests a distinction between charterparties, namely, that by some, the advanced payment is a payment in part of freight, and in others not; and if not, the advance must be a loan. And it is an authority that, in the reign of Charles II., the acknowledged understanding, the rule was, that money to be paid in advance of freight, by the terms of the contract of carriage, could not, if paid, be demanded back in consequence of the loss of the ship and cargo on the voyage.

In *Blakey v. Dixon* (') the declaration alleged a promise to pay the money due for freight on a delivery of the bill of lading, and then alleged the delivery of the bill of lading, 218] and that by **reason thereof* the defendant was liable to pay the freight. There was no allegation of the arrival of the ship, or of the delivery of the goods. Upon a special demurrer, Lord Eldon and others decided for the defendant. But the judgments obviously intimate, that if the promise or contract to *pay the freight on the delivery of the bill of lading* had been set out with sufficient particularity, the claim might have been supported without alleging the arrival of the ship, or delivery of the cargo. Such intimation is authority for the proposition, that if by the contract there is to be a prepayment of the freight, or part of it, an action may be maintained for such money before the cargo has arrived, or although the cargo be lost. It was stated by Sergeant Shepherd in that case, that it was always customary in the carriage of goods to India to contract for payment of freight previous to the sailing of the ship.

In *Mashiter v. Buller* (') the evidence is said to have consisted of the bills of lading, some of which stated that the goods were to be delivered at Lisbon, "freight for the said goods being paid in London," and others "the shippers paying freight for the said goods in London." The ship sailed, but was lost in the Downs. Lord Ellenborough held, that the words in these bills of lading only meant, that the freight should be paid in London instead of in Lisbon; and that they by no means dispensed with the performance of the voyage. He added, that *if the defendants had paid the freight upon the shipment of the goods, they might have recovered every penny of it back again*. The decision, it should be observed, is, that by virtue of those bills of lading, expressed as they were, the only stipulation was that the freight should be paid in London instead of at Lisbon; that is to say, that it did not alter the time of pay-

(') 2 B. & P., 321.

(') 1 Camp., 84.

ment, but only the place. The freight, according to that construction, was not payable until after the ship had arrived at Lisbon, though it was to be paid in London instead of in Lisbon. If this was a correct construction, the result of the case, and the other remarks made in it, were of course correct. If it was not, the result and the remarks have since frequently been overruled. The case is no authority upon any question of law arising where money to be paid for the carriage of goods in ships is, by the contract, to be paid before the delivery of the goods.

*In *Andrew v. Moorhouse* ⁽¹⁾ the plaintiffs, the [219 shipowners, were held to be entitled to recover, after the loss of the ship on the voyage, the whole amount of freight for the whole cargo shipped, because the contract of carriage was found to be a contract to carry the goods to the Cape for £5 per ton, and there to deliver them, "freight being paid," and also that "*the £5 was to be paid in London.*" The court held that if the true construction of the contract was that the freight was to be paid in London *on the sailing of the ship*, the shipowner was entitled to recover the whole of it, although none of the cargo had been carried to the port of delivery by reason of the whole having been lost at sea. No point was made of each party bearing half the loss; the charterer had to pay the whole of the freight, after the loss, because he had agreed that the whole should be prepaid.

In *De Silvale v. Kendall* ⁽²⁾ the action was brought by the charterer to recover back money paid in advance. The charterparty was as nearly as possible in the same form as in the present case. It was, amongst other things, to convey cotton from Maranham to Liverpool, at and after the rate of 2½ annas per lb. weight *for each and every pound of cotton which should be delivered at the King's Beam in Liverpool, such freight to be paid as follows, viz., as much cash as may be found necessary for the vessel's disbursements at Maranham to be advanced, &c., free from interest and commission, &c., and the residue of such freight to be paid on the delivery of the cargo in Liverpool.* The plaintiffs, the charterers, advanced £192 at Maranham for the ship's disbursements. A cargo was loaded, but the ship was captured on the voyage, and never arrived at Liverpool. It was argued that the advance was either a loan or an advance of part of the freight, *liable to be refunded if in the result no homeward freight should become due.* It was held that the advance was a *prepayment of freight*, and

⁽¹⁾ 5 Taunt., 435.

⁽²⁾ 4 M. & S., 37.

that, by the law of England, *prepaid freight* is not to be returned because by accident the cargo is lost. "If" (says Lord Ellenborough, who had decided *Mashiter v. Buller* (1)), "the parties have chosen to stipulate by express words, or by words not express, but sufficiently intelligible to that end, 220] that a part of the freight (using the word *freight) should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate?" This shows what was Lord Ellenborough's view of the law, and gives the true measure of *Mashiter v. Buller* (1). In order to interpret the charterparty all the judges rely upon the phrases "*such freight* to be paid as follows," and "*the residue of such freight* to be paid," &c., which are the words used in the present charterparty. They also, it is true, rely upon the stipulation that the advance is to be "free from interest and commission." What effect the presence of the latter stipulation has will be seen in subsequent cases.

In *Manfield and Another v. Maitland* (2) the action was on a policy to insure an acceptance of £219. The acceptance had been given by the plaintiff, the assured, in pursuance of a charterparty, by which he had chartered a ship to carry deals from Quebec to Bridgwater, and there deliver them, being paid freight for the deals £10 5s. per hundred, one half of the freight to be paid *in cash* on unloading and right delivery of the cargo, and the remainder by *bill on London at four months*. The *captain to be supplied with cash for the ship's use*. The ship was lost. It was held, that the plaintiff had no insurable interest under the policy, because, on a true construction of this charterparty, the advance was not a prepayment of any part of the freight, but only a loan. Being a loan, the plaintiff was entitled to deduct it from freight, if freight became payable, and to claim its repayment if no freight became payable. In that charterparty, it will be observed, the whole of the freight was made payable on the unloading and right delivery; half of it was to be paid *then* in cash, and half *then* by bill to be then given. The stipulation as to the advance was not incorporated into a sentence headed, "*such freight* to be paid," &c. There were no words such as "*the residue of such freight* to be paid on delivery," &c.

In *Saunders v. Drew* (3) the action was brought to recover back money paid in advance. The charterparty was in part for the hire of the ship for an intermediate voyage at the rate of £1 per ton per month for every ton of the ship's

(1) 1 Camp., 84.

(2) 4 B. & Ald., 582.

(3) 3 B. & Ad., 445.

register tonnage; the charterer to pay four months of *such monthly hire* in advance, and the **balance that may [221 be due, at the termination of the period* for which she may be hired, in cash at the port where she may be discharged. The ship was hired for the intermediate voyage, and the plaintiff paid in advance £1,734 for four months' hire. The ship was lost two months after the hiring. It was held, that the plaintiff could not recover back any part of the £1,734, because it was in terms a prepayment of part of the freight. There was no suggestion, made in argument or judgment that the charterer and shipowner should each bear half the loss, and that therefore the plaintiff should recover back the payment in respect of one of the two lost months.

In *Hall v. Janson* (') a declaration on a policy was held good on general demurrer, because it alleged that the insurance was expressed in the policy to be on freight, and then alleged, as a fact outside the policy, "that Edward Serreys was interested in the money so insured, as being money advanced to him, as owner of the ship, on account of freight, and *being subject to the risk of the said voyage.*" It was held, that it was consistent with this allegation that, although, by the contract of carriage, the advance was to be on account of freight, it was stipulated by the same contract that it should be returned if the ship should be lost. This case suggests prepaid freight, but accompanied by an express stipulation that it should be repaid if the cargo should not arrive. It is, however, in truth, a case of pleading, and not of a real business transaction.

In *Hicks v. Shield* (') the charterparty was between the plaintiff as charterer, and the defendants as owners, to carry rice from Rangoon to London, and there deliver the same, on being paid freight as follows: £5 5s. per ton net rice delivered, &c. *Cash for ship's disbursements to be advanced* to the extent of £300, free of interest, but *subject to insurance*, and 2½ per cent. commission in full of port and pilotage charges, &c. The freight to be paid on unloading and right delivery, &c. The plaintiff advanced £300, the ship was lost. The question was, whether the defendant was bound to repay the whole or any part. It was argued, that the advance was a mere loan. It was held otherwise, because of the indication, arising from the stipulation that the advance might be **insured*. "The only question" [222 (says Lord Campbell) "is whether this was a mere loan, or an advance of freight. A sum of £300 is to be advanced, subject to certain deductions, one of which is for insurance.

(') 4 El. & Bl., 500.

(') 7 El. & Bl., 633.

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If it is to be insured, it must be for freight in advance; for a mere loan could not be insured; and if it is not a mere loan, but advance of freight, the plaintiff cannot recover it back." In the course of the argument, Crompton, J., pointed out, that if it was a loan, it could not be insured either by the charterer or the shipowners; neither would be subject to loss by sea risk. In that case the stipulation as to insurance was relied on, in the absence of such phrases as "such freight to be paid as follows," and "the residue of such freight to be paid on delivery." It is an authority as to the effect of the stipulation as to insurance, and shows that the effect is, that it indicates that the advance is an advance of freight, and is not by way of loan. Again, there is no allusion to the idea of each party bearing half the loss.

In *Jackson v. Isaacs* (1) the declaration was on a charter-party between the plaintiff as owner, and the defendant as charterer, by which the ship was to carry a cargo of salt to Fernando Po, and there deliver the same, on being paid freight at 20s. per ton on the quantity shipped, *payable by charterer's acceptance at four months on ship clearing at the custom house, Liverpool, subject to insurance.* Breach for not giving the acceptance. Plea that the freight was to be paid in advance, *subject to insurance*, and that the plaintiff never did insure for the benefit of the defendant, or otherwise howsoever, and that the ship and cargo were wholly lost, &c. Demurrer. It was argued by the plaintiff, that the contract appeared to be a contract to pay freight in advance, subject to a deduction of the premium for insurance; that the plaintiff, after payment to him of the advance, would have had no insurable interest; the risk would have been on the defendant; he therefore was the only party who could have insured; and that the reasonable construction of the contract was, that he should deduct the cost of doing so. It was argued for the defendant, that the true construction of the contract was, that the defendant agreed to advance freight, subject to the plaintiff insuring to the defendant, in case of loss of the cargo, the return of the 223] *freight, either by repaying it or insuring it for the defendant. The plea was held to be bad for several reasons. But Baron Watson gave this reason, "There is no doubt what is meant by this stipulation. It provides for a payment of freight in advance. The defendant, then (who was the charterer), was the only person who could have insured the freight. It therefore seems clear, that the payment by the defendant was to be subject to a deduction for the ex-

(1) 3 H. & N., 405.

pense of the insurance which he was to effect." This case shows the true meaning of the stipulation, that the charterer will advance freight, or a part of it, "*subject to insurance*," or "*less insurance*." If there had been no advance, the shipowner would have had to insure. If the charterer had advanced without deduction, the shipowner would have obtained the full freight without the burden of having to insure, and the charterer would have had to pay the full freight, and besides to insure. In order to restore the position of both to what it would be if the freight were to be paid at the end, instead of at the beginning, of the voyage, the advance is paid, less insurance. The shipowner gets the freight at the beginning, less what he would have had to pay for insurance if he were only to get the full freight at the end; the charterer pays the freight at the beginning, less the amount which he must, for so doing, have to pay for insurance against the risk cast upon him by the prepayment. This is precisely the explanation of the present charterparty given by Baron Cleasby in the Court of Exchequer Chamber.

In *Byrne v. Schiller* (¹) the action was on a charterparty between the plaintiff as owner, and the defendant as charterer, to recover a sum of £737, alleged to be due for advance freight, although the ship was lost on the voyage. The charterparty was to carry rice in bags from Calcutta to Colombo, the charterer paying freight on the same at, &c., per bag of rice delivered; such freight to be paid as follows: £1,200 to be advanced at Calcutta against master's receipt, and to be deducted, together with 1½ per cent. commission on the amount advanced and cost of insurance, from freight on settlement thereof, and the remainder on right delivery of the cargo at port of discharge. The master to sign bills of lading at any current rate of freight required, without prejudice to the *charterparty, but not under [224 chartered rates, *except the difference is paid in cash*. It was held, that both the £1,200 and the £737, which was the difference between the bill of lading and charter freight, were sums agreed to be paid *as advance of freight*, and therefore that the plaintiff was entitled to recover the whole of both, although the ship was lost on the voyage. In the Court of Error, it was argued by Mr. Butt for the defendant, in an exhaustive argument of great research, that a prepayment of freight is not final, but can be recovered back if the goods are lost, and the freight, therefore, never earned. In answer, Cockburn, C.J., said: "We are all agreed that

(¹) Law Rep., 6 Ex., 20; in error, Ibid., 319.

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the law is too firmly settled for us to depart from it, even in a court of appeal, that where freight is paid in advance it cannot be recovered back." It was also held that, upon a true construction of the charterparty, both sums, that of £1,200 and that of £737, were payments to be made in advance of freight. It should be observed, as to the £1,200, that not only that sum was to be deducted, but also the cost of insuring it was to be deducted, from the freight to be earned. And, farther, that no one suggested that anything less than the whole advance freight was payable, although the whole cargo was lost.

It becomes necessary, in the next place, in consequence of the argument founded on them, to consider the true import of the often-quoted words of Lord Kingsdown in *Kirchner v. Venus* ⁽¹⁾. In that case there was no dispute that the freight was payable by the shipper in advance. It was agreed that it should be paid by him in advance at Liverpool. The port of discharge was Sydney. The bills of lading were indorsed for value. The shipper did not make the stipulated payment in advance. The captain at Sydney claiming a lien on the cargo for freight, refused to deliver the cargo to the assignee of the bill of lading without payment by him of the freight. The advice of the Council was, that there was no lien. It was not necessary to say, that advance freight was not freight at all. It was only necessary to say, that the incident of lien did not attach to freight so to be paid. And I think that the latter is all that is said by Lord Kingsdown. He does not say, that the money payable in advance is not freight at all. Contrasting the characteristics 225] or incidents of the money agreed *to be paid in advance for the carriage of goods in a ship, with those of money to be paid on delivery of the goods, he says, that the first does not acquire the *legal character* of the other, nor does it acquire *its legal incidents*. By the first, he is alluding to the characteristic of freight not being payable till earned by carriage, and by the second, to the incident of lien. So, in the next phrase, he does not say that the money *is paid for* taking the goods on board, &c., but that it is so in effect. He did not mean to say that prepaid freight, or money to be paid in advance of freight, is not freight, or a part of the freight for the carriage of the goods, otherwise, in the first place, he would, if the whole freight were to be prepaid, leave it,—that the cargo was to be carried on the voyage for nothing, and indeed, as it would seem, that there would be no contract to carry on the voyage; and in

(1) 12 Moo. P. C., 361.

the second place, at least, he would reduce such advance to a loan, and so hold in contravention of all the cases. The decision is, that where the agreed time of payment of the freight is not contemporaneous with the delivery of the cargo, there is no implied right of lien. The observations of Lord Kingsdown are pointed to that question. The true meaning of them is, that, so far as concerns a question of nothing being due until delivery, or a question of lien, it is the same, in effect, as if the money were to be paid for taking the goods on board, &c., and as if it were not to be paid for carrying them.

The case of *Tamvaco v. Simpson* (1), in the Court of Exchequer Chamber, is in accordance with the case in the Privy Council.

The case of *Watson v. Shankland* (2) was relied on. It was an appeal from Scotland. There is great doubt whether the English rule as to prepaid freight applies in Scotland. If it does not, I should venture to think that prepaid freight is, in Scotland, a loan. If it does, I should venture to think that the advance, on such a contract as was proved in the case, was prepaid freight, and on that ground could not be recovered back. The decision, however, was, that, assuming the advance to be a loan, it could not be recovered back. If in the present case, which is to be decided according to English law, the advance could be treated as a loan, it might be necessary to consider that case with the utmost attention; *but it was not argued in this case that the [226 advance was a mere loan, and it would, as it seems to me, be impossible to hold that it was, without overruling all the cases on this subject, or the doctrine assumed in all which have been decided, since the time of Charles II.

I have drawn attention to all the cases, in order to show how uniform the view has been as to what construction is to be put upon shipping documents in the form of the present charterparty, and as to the uniform, though perhaps anomalous rule, that the money to be paid in advance of freight must be paid, though the goods are before payment lost by perils of the sea, and cannot be recovered back after, if paid before the goods are lost by perils of the sea. Although I have said that this course of business may in theory be anomalous, I think its origin and existence are capable of a reasonable explanation. It arose in the case of the long Indian voyages. The length of voyage would keep the shipowner for too long a time out of money; and freight is much more difficult to pledge, as a security to

(1) Law Rep., 1 C. P., 383.

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(2) Law Rep., 2 H. L., Sc., 304.

third persons, than goods represented by a bill of lading. Therefore the shipper agreed to make the advance on what he would ultimately have to pay, and, for a consideration, took the risk in order to obviate a repayment, which disarranges business transactions.

It seems to me, and I submit that, on a review of all the cases, the true construction of the charterparty in this case is, that the £2,000, which were to be paid and were paid in advance, constituted a prepayment of the freight payable under the charterparty, and no part of it could be recovered back by the charterer from the shipowner, and that the stipulation as to deduction for insurance did not alter this right of the shipowner. I do not understand that it is denied that the freight to be earned, and earned by the shipowner in this case, was £2 per ton on the amount of coal delivered at Bombay. Indeed, to hold otherwise would be flatly to contradict the charterparty. But it is suggested, and was held in the Exchequer Chamber, that the prepayment under such a contract is not in respect of the freight which is eventually earned, but of the freight which would be earned if the whole cargo should arrive and be delivered, so as to be a prepayment of so much per ton on every ton of the 227] cargo shipped. Let this be *tested on the assumption that no part of the advance can be paid back, which I submit is conclusively proved to be a correct assumption by the cases I have cited, and that there is no insurance by either party. Taking the figures of the present case, if 1,000 tons are delivered, the freight earned is £2,000; but the charterer could, upon the assumption, only affirm effectually that £1 per ton had been prepaid in respect of those 1,000 tons; therefore he must pay the other £1 per ton, or £1,000, for freight. The charterer will have paid £3,000, and the shipowner will keep £2,000, and receive £1,000, or in the result have £3,000. The one will in effect have paid, and the other have received, £3,000 for the delivery, after transport, of 1,000 tons. In effect that will be £3 per ton. If 500 tons are delivered, £500 are to be paid for freight; £2,000 are to be kept; £2,500 are in effect paid and received, or in effect £5 per ton. If 1,500 tons are delivered, £1,500 are to be paid for freight; £2,000 are to be kept; £3,500 are in effect paid and received, or in effect £2 6s. 5d. per ton. The charterer, upon the assumption, must in effect pay more than £2 per ton in every case, except where the whole cargo is delivered. And if the shipowner is to pay back a part, then either a part is a mere loan, or money which is prepaid freight must be paid back, both of which views are contrary to all the

cases. Whereas, on the contrary, if the amount of freight earned is set down according to the quantity of cargo delivered, and so debited to the charterer, and he is credited against it, as a whole, with the amount paid in advance, every word of the charterparty is satisfied, no word is contradicted, and nothing is done in conflict with any decided case. It follows that, in my opinion, the shipowner, the plaintiff in this case, could not have claimed anything more from the charterer than the £2,000 which had been prepaid; that the only freight which the plaintiff had at risk was the balance, if any, of freight to be received at Bombay, if the ship with sufficient cargo arrived there; that the freight which was insured was that freight or balance of freight which was to be received at Bombay if the cargo should arrive safely, and lost if it did not, and that there was a total loss of such insured freight. I entirely agree with the judgment of Baron Cleasby in the Exchequer Chamber, and with the reasons given by him for it. I cannot *agree [228 with those judgments which, with great deference, seem to me to be rested on suggested equities between the charterer and shipowner which never existed, and on suggested equities between different underwriters, which, if they existed, should not be considered in this case.

I submit to your Lordships that the judgment of the Exchequer Chamber should be reversed. I answer your Lordships' question by saying that in my opinion there was a total loss.

My Lords, in this opinion my Brother Pollock agrees.

MR. JUSTICE GROVE (read by Mr. Justice Brett): I agree with the judgment of the Court of Common Pleas, and that of Barons Cleasby and Pollock in the Exchequer Chamber. I can add nothing to the reasons given. I answer your Lordships' question by saying that in my opinion there was a total loss.

MR. JUSTICE MELLOR (read by Mr. Justice Blackburn): My Lords, in answer to the question propounded by your Lordships to the judges who attended the hearing of this case, I am of opinion that under the circumstances there was a partial loss only, and not a total loss of the subject-matter of insurance. I expressed my opinion to that effect in the judgment which I delivered in the Exchequer Chamber (¹), to which I venture to refer. I forbear to trouble your Lordships with any farther observation on the case, especially as I entirely concur with the opinion of my Brother Blackburn, expressed in the answer which he is

(¹) Law Rep., 9 C. P., 565.

prepared to give to the question propounded by your Lordships, to the effect that, under the circumstances of the case, the loss of the subject-matter of insurance was partial only.

MR. JUSTICE BLACKBURN: My Lords, in my opinion there was only a partial loss of the subject-matter of insurance. My reasons for this opinion are as follows: Freight is the reward payable to the carrier for the safe carriage and delivery of goods; it is payable only on the safe carriage and delivery; if the goods are lost on the voyage, nothing 229] *is payable; and in cases where the freight is made payable at so much per ton of the goods, and part of the goods only are delivered, a proportionate part of the freight only is payable. But a sum of money payable by the shippers of the goods at the port of shipment does not acquire the legal character of freight because it is described under that name in a charterparty. It is, in effect, money to be paid for taking the goods on board and undertaking to carry, and not for carrying them. This, which I have taken, with a slight alteration from the judgment of Lord Kingsdown in *Kirchner v. Venus* (*), in my opinion is an accurate statement of the law.

A sum of money may be advanced as a loan on the security of the freight to be earned, and in such a case may be recovered back though the freight is lost; but I think it has always been held that a stipulation, which shows that the merchant is to insure the amount, is almost conclusive to show that it is not a loan on the security of freight to be earned, but an advance of freight: *Hicks v. Shield* (*); *Frayes v. Worms* (*); and if it is an advance of freight, then by our law, differing in that respect from the law of some other countries, it cannot be recovered back in whole or in part, though the ship or the goods, or part of them, are lost, and consequently the freight is in whole or part unearned: *Byrne v. Schiller* (*).

Merchants, according to my experience, attach very great weight to a stipulation as to who is to insure, as showing who is to bear the risk of loss; and I cannot doubt that both the plaintiff and De Mattos perfectly understood that the sum paid on signing the bill of lading under this charterparty was an advance of freight, which was to be at the risk of the owner of the goods, and could not be recovered back though the goods were all lost; that it was in effect, to use Lord Kingsdown's language, not freight for carrying the goods, but money paid for taking the goods on board

(*) 12 Moo. P. C., 390.

(*) 7 El. & Bl., 683.

(*) 19 C. B. (N.S.), 159.

(*) Law Rep., 6 Ex., 812.

and undertaking to carry them. It might be insured by the owner of the goods either under the description of "prepaid freight;" or as "the increased value of the goods by prepayment of freight," which latter form was adopted by De Mattos in this case.

*Had the charterparty been expressed, "freight to [230 be at 42s. per ton, one guinea to be paid on the right and true delivery, and one guinea in advance on signing bills of lading," there could have been no dispute about the matter. The loss of a certain number of tons would have caused the shipowner to lose a proportionate number of guineas, because his freight *pro tanto* was not earned; and would also have caused the goods owner, De Mattos, to lose an equal number of guineas, because he had lost the benefit of the number of guineas he had paid for the undertaking to carry his coals. The loss of each individual ton would have occasioned the same loss to each, and in the event that has happened of a loss of one half of the coals, there would be a loss of 50 per cent. on this policy on the freight, and also a loss of 50 per cent. on De Mattos' policy on "the coals, and increased value thereof by prepayment of freight."

The defendants contend, and I think rightly, that on the true construction of the charterparty, the effect is the same as if it had been expressly stated as above.

But the plaintiff puts a different construction on the charterparty. He contends that it was intended that the advance was to be against whatever freight was ultimately earned, and at the end of the voyage to be deducted from whatever freight was earned, and consequently that, though it was the goods owner's (De Mattos) risk in one sense, as it could not be recovered back in any event, yet the owner of the goods, De Mattos, was to lose nothing in respect of the prepaid freight, or the enhanced value of the goods, until half or more of the goods were lost. That the loss of the first ton of coals was a loss to the shipowners of two guineas of freight, and no loss at all of the money paid in advance, nor of the increased value of the goods, and that so it continued till half of the coals were lost, and then that the loss of each ton above the half would be no loss to the shipowner at all, but a loss to the goods owners of two guineas out of the money paid in advance. That, in short, under this charterparty the loss of the freight was total as soon as half the coals were lost, and the risk to the owner of the goods, as far as regards the prepaid freight or enhanced value of the goods, did not commence till half the coals were lost.

1875

Allison v. Bristol Marine Insurance Co.

H.L. (E.)

231] *Had the underwriters pleaded and proved that the insured did not disclose this peculiar nature of the charterparty making the risk double what in ordinary circumstances it would have been, that would have been a good defence. They have not so pleaded, and therefore we must act on the supposition (whether correct in fact or not I do not know) that the charterparty was disclosed, in which case, if the underwriters misconstrued it, it was their own fault. But, as already said, I do not think they have misconstrued it; and what is the true construction of the charterparty is really the matter in dispute in this cause.

It is very difficult to argue on the construction of such an instrument, or to do more than to state one's view of what it means. The words are, "freight to be paid on unloading and right delivery of the cargo at and after the rate of 42s. per ton on the quantity delivered," and had it stopped there, I think there would be no room for doubt that it meant 42s. per ton for each ton delivered, and nothing for those not delivered, so that a partial loss of the goods would be a partial loss of a proportionate part of the freight. But it goes on, "such freight to be paid, say, one half in cash on signing bills of lading, less" certain deductions, including 5 per cent. for insurance. That clearly expresses that 21s., less these deductions, were to be paid for every ton put on board, without reference to whether it was all delivered or not, "and the remainder on right delivery of the cargo." I think that means the remainder of the 42s. per ton on the right delivery of each ton. Had the broker who drew up the charterparty adopted language similar to that used in *Byrne v. Schiller* (¹), and said, "the amount paid on signing the bill of lading to be deducted from freight on settlement thereof," it would have clearly expressed what is now said to have been the intention. But in the absence of those or any similar words, I think that is not the meaning of the words used. The construction contended for by the appellant seems to me forced and unnatural, and not that which mercantile men would put upon such a contract.

I do not like to make assertions as to what mercantile men would say, knowing as I do that other judges would 232] make *contrary assertions; and we have very little to assist us in ascertaining what merchants really would think. I see that my Brother Cleasby, in his judgment in the Exchequer Chamber, attaches weight to the conduct of the master in delivering up the coals without payment of the 21s. per ton, as evidence of the understanding of merchants

(¹) Law Rep., 6 Ex., 20, 319.

on the construction of the charterparty. And this was repeated on the argument at your Lordships' bar. I am not sure that a legitimate argument as to the mercantile understanding can be deduced from the conduct of parties after the dispute has arisen, and in no case do I attach much weight to the conduct of the captain's seeking to charge underwriters, whom all captains are too apt to think their legitimate prey ; I should myself attach more weight to the conduct of the insurance brokers who worded both policies as if they believed that the risk as to the freight and as to the enhanced value of the goods was the ordinary risk, subject to a partial loss on the loss of any part of the goods. Had De Mattos and his brokers thought that no part of the prepaid freight, which formed more than half of the value which he insured, was to be lost till more than one half of the goods had been lost, so as to render the risk as to this much less than the risk as to the goods themselves, he would, I should think, not have shaped his policy so as to lump these two unequal risks together. He would, I think, have severed the two in his policy and have required that the premium for the smaller risk should be less, instead of insuring, as he did, as if his risk as to the enhanced value of the goods was the same as that on the goods themselves.

I have only farther to observe that the terms of the charterparty, "42s. per ton delivered, to be paid one half in cash on signing bills of lading" are exactly equivalent to saying "21s. to be paid on every ton put on board." If no disaster happened the number of tons delivered would be the same as the number of tons put on board ; but I do not think it an accurate statement to say that the payment was to be one half of the estimated freight, which is the phrase used by each of the judges in the Court of Common Pleas, and I cannot but think that a fallacy lurks under this, to my mind, inappropriate expression.

I have only to add, that where there has been such a difference *of opinion on the question of what is the in- [233] tention of the parties as expressed in this charterparty, it is impossible to say that the meaning is clear. It will appear different to different minds. I can only say that to me the intention appears to be to express that which the respondents say has been expressed. And such being my opinion, I answer your Lordships' question by saying that there was only a partial loss of the subject-matter of insurance.

March 30. LORD CHELMSFORD: My Lords, this appeal is from the judgment of the Court of Exchequer Chamber, in

an action brought by the plaintiff on two policies of insurance to recover a total loss of freight. The Court of Common Pleas unanimously gave judgment in favor of the plaintiff. The Court of Exchequer Chamber reversed that judgment by a majority of three to two, holding that there was only a partial loss of the subject-matter of insurance, and the learned judges who have been summoned to assist your Lordships have differed in opinion; so that in the result there are five judges in favor of the plaintiff and four in favor of the defendant. In this difference of opinion, it is impossible not to feel that the question is one of some difficulty. It appears to me to depend altogether upon the proper construction of the charterparty: [His Lordship stated that instrument and the facts of the case.]

In considering the question it is necessary in the first place to determine the character of the payment which was made by the charterer at the time of signing the bills of lading.

Was it an advance in the nature of a loan, or was it a prepayment of half the freight, the whole of which was to be earned by the unloading and delivery of the cargo at Bombay? It is unnecessary to consider the case of *Kirchner v.*

Venus ⁽¹⁾ which was often referred to in the course of the argument, but which appears to me to have turned entirely upon the question of lien, so that the language used with respect to payments made by the shippers of goods at the port of discharge not acquiring the legal character of freight ⁽²⁾ must be received with some qualification. But this case is altogether removed from the authority of *Kirchner v. Venus*, *because here the parties, by their charterparty, have agreed that the payment shall be the advance of half the freight, and that the shipowner shall have an absolute lien for freight. The charterparty contains a provision for the charterer to deduct from the payment of half freight 5 per cent. for insurance, and Mr. Justice Blackburn, in his opinion delivered to the House, stated "that it had always been held that a stipulation that the merchant is to insure the amount, is almost conclusive to show that it is not a loan on security of freight to be earned, but an advance of freight." There can be no doubt, therefore, that the sum paid by De Mattos was a prepayment of freight, and as such, according to settled authorities, could not be recovered back again. That portion of the freight received by the plaintiff was therefore never at risk on the voyage insured.

⁽¹⁾ 12 Moo. P. C., §61.

⁽²⁾ 12 Moo. P. C., at p. 390.

But then the question arises what was the portion of freight which was covered by this prepayment?

On the part of the defendant it was contended that under the words of the charterparty the freight being payable not in a gross sum but after the rate of 42s. per ton of coals on the quantity delivered, the freight must be distributed over the whole cargo at the rate of 42s. for each ton, which will be equivalent to the payment of £1 1s. on every ton of the cargo put on board, leaving only £1 1s. to be paid for freight on the entire cargo delivered. If this mode of calculating the freight is adopted the plaintiff's loss would of course be only a partial one.

But I am not disposed to take this view of the stipulation as to payment of freight in the charterparty. I think that the freight payable is the freight upon the whole quantity of coals delivered at the rate of 42s. per ton, and the part which was prepaid was assumed upon an estimate of half of that quantity. If the parties had intended that the prepayment should be calculated upon the footing of one half of the cargo, at so much per ton, nothing would have been easier than to have expressed this in words. The bill of lading was signed for 2,178 tons, the half freight was to be paid on signing the bill of lading, and the receipt was indorsed on the bill of lading. If the prepayment was meant to be applied to half the rate of freight over the whole number of tons of coal shipped, the amount could have been easily ascertained and the intention clearly expressed. The manner in [235 which the half of the freight was agreed upon, satisfies me that the sum paid was taken generally as representing one half of the freight of the entire cargo, at the rate of 42s. per ton.

This being my view of the case, it follows that the plaintiff never had more than half the freight as a gross sum at risk, on the voyage insured. If all the coals had been delivered he would have had to receive the amount of the whole agreed freight minus the £2,286 already paid. In the event which occurred, he had secured himself against the loss of one half of the freight by the prepayment; the only insurable interest in the freight which remained to him was the unpaid half, the whole of which he lost by the perils of the seas, and therefore his loss was a total loss.

I think the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD HATHERLEY: My Lords, I concur entirely in the view which has been taken of the case before us by my noble and learned friend who has preceded me in expressing his opinion upon it.

The two points to be considered are, first, what is the insurance that has been effected by the policy and the subject-matter thereby insured; and we are led, in the consideration of that point, to the farther question as to what was the contract between the insurer and the person with whom he bargained, as the charterer of the ship, in order to ascertain what were the perils of the sea against which the assured desired so to protect himself.

Now, my Lords, we must bear in mind in this inquiry, in the first instance, that if there be any question or doubt (I think in truth we shall find there is none) as to what the subject-matter of insurance is, then on principle it is to be held in all cases that that in respect of which the insurance is made is that which is capable of being a subject-matter of insurance, namely, that which is at risk; and that in regarding the contract of insurance, we must not assume, and we cannot in any way consistently with law assume, that the assured is endeavoring to effect a policy upon that which is at no risk whatever. Next, when we come to look at the contract itself, it being a contract of freight, we have to 236] *remember that from a very early period, as long ago, it was said during the argument, as the time of Charles II.—at all events for a very long time—it has been settled in our maritime law that prepaid freight cannot be recovered back. I think when we consider these two points, that on the one hand that is to be taken as insured which is at risk, and on the other hand that prepaid freight cannot be recovered back, we shall be led very easily and safely to the solution of the difficulty which appears to have arisen in the case before us.

We have now had the advantage of hearing the opinions of the several judges, who, both in the court below and afterwards in assisting your Lordships' House, have expressed their opinions upon the matter; and we have had the benefit of hearing the arguments upon which these opinions were founded, as well as the arguments which were adduced at the bar. Therefore it may well be that a subject which has been one of considerable doubt, and has been supposed to be one of difficulty, before arriving at this stage of the argument, may without presumption on my part appear to me to be free from difficulty as regards the final conclusion we are bound to arrive at.

My Lords, in the first place the contract of insurance is an insurance of freight. The question is, what is that freight which is so insured? To answer that question we look at the charterparty which was entered into between the ship-owner and the charterer; and that charterparty we find to

be a contract or engagement on the part of the charterer, who was about to enter into the engagement with reference to a cargo of coals to be delivered at Bombay, that he will pay freight "on unloading and right delivery of the cargo, at and after the rate of 42s. per ton on the quantity delivered," neither more nor less. He is not to pay more freight than at that rate upon whatever may be delivered. That is the sum and substance of his engagement. But then as to the mode of paying the freight, he proposes to pay it in this way: instead of waiting until the time of delivery as regards the whole cargo, he engages that he will pay "one half in cash on signing bills of lading, less four months' interest." That is the discount, therefore, on the payment in respect of its being made at once, and before the period of delivery at Bombay. "Less four months' interest, *and less [237 5 per cent. for insurance, and 2½ per cent., &c., in lieu of consignment at Bombay." That last 2½ per cent. we need not consider. Therefore it is less four months' interest and 5 per cent. for insurance.

Now what seems to have grown up to be the practice in shipping transactions of this character is founded very probably upon the determination of the courts of law, that pre-paid freight cannot be recovered back. What seems to have happened is, that the parties who are desirous of having the freight prepaid to a certain extent, in order to avoid during a long voyage being kept for a long time out of their money, have entered into an arrangement with the charterer to this effect: I shall wish to have my money in hand, to some amount at all events, upon this charter of freight; I therefore stipulate with you that some of this money shall be paid down (in this case one half), but I will give a rebate of interest, which is in effect discounting this prepayment; and I will give a farther rebate of insurance, because, inasmuch as you are making this payment, and inasmuch as you cannot recover it back in the event of there being a loss of the cargo, the risk becomes yours and not mine. What would ordinarily be the risk of the shipowner with regard to the freight so prepaid is transferred in this way to the charterer, and the shipowner has the money in pocket; and having the money in pocket, and seeing that it cannot be recovered back, he is assured of that—that is at no risk. Whatever loss happens at sea, he retains that money; and therefore, if there be a total loss of the whole cargo, the loss in respect of this prepayment of freight falls upon the person who has so prepaid it. Consequently a custom seems to have grown up of allowing a sum by way of insurance,

in order to compensate the person making this prepayment for the risk he thereby runs, inasmuch as he cannot recover it back again if there be a total loss of the cargo.

That being so, my Lords, you find this state of things; as to a moiety of this freight the shipowner is quite safe; he cannot want to insure it, he has got it. But as to the other moiety, he is not safe as regards the perils of the sea, because if there should be a total loss, and if he should not be able to deliver any part of the goods, then he would get no [238] more freight. He has got one moiety *safe in his pocket; the other moiety is that which is at risk, and that he can insure. Therefore, when you look at the contract of insurance in this case, which we have here before us, and ask as to which of the moieties of freight the insurance is effected, the answer must be the shipowner has effected the insurance upon the unpaid moiety, which may be lost entirely to him. He cannot effect an insurance upon that which is at no risk; therefore he must be taken to have done that which only he rightly could do, namely, to have insured against that which is at risk—the other moiety of the freight, which may be lost to him in consequence of the perils of the sea.

On the other hand, what is the position of the charterer? It is this. He has agreed to pay 42s. per ton only on whatever is delivered to him; he has paid down to the extent of 21s. per ton; he can have only 21s. per ton more to pay if the whole of the cargo is delivered to him: but supposing there is no more delivered to him than the 21s. per ton would cover, what is then to happen? Why, he is entitled to say, you have delivered to me half the cargo; I was only to pay you, say £4,000, for the 2,000 tons of coal if you delivered the whole quantity; you have delivered to me, instead of 2,000 tons, only 1,000. I have paid you for 1,000 already; that I have done, and I am not to pay more. Otherwise if you were to say (and this is the effect of the decision of the Court of Exchequer Chamber which your Lordships are now considering), that the charterer is to pay in respect of the half saved—that is, 1,000 tons—he would be paying upon 3,000 tons; or, to put it in pounds, to make the numbers easier, he would be paying £3 for every ton of coal delivered. Would he not have a right to say: You have delivered to me 1,000 tons. I paid £2 per ton on 1,000 tons before the ship started, under the contract I entered into, and now you ask me for another £1 in respect of the portion of the coals which has been saved, there being only one half saved altogether; in that way you are making me pay £3 per ton for the coals delivered, as to

which I entered into an engagement to pay you 42s. per ton and no more.

My Lords, when we look at the case in that simple way, it appears to me that the whole difficulty is at once solved. On the one hand you have the charterer saying: I am not to be compelled *to pay more than I agreed to pay. [239 On the other hand you have the other party insuring, not the freight he has got in his pocket, but freight that is still at risk, and which he may lose by the loss of half the cargo.

My Lords, having said this much I have very little more to add upon the subject. But with regard to the view taken by Mr. Justice Blackburn, for whose opinion I have the highest respect, as I have for any opinion of that learned judge, it appears to me that he is under error, when, in advising your Lordships, he thus states the case. He says that the contention of the plaintiff in the cause is this, "that in short, under this charterparty, the loss of the freight was total as soon as half the coals were lost, and the risk to the owner of the goods, as far as regards the prepaid freight or enhanced value of the goods, did not commence till half the coals were lost." But, my Lords, as I said before, instead of being a total loss of freight to him he had got half the freight already in his pocket. No doubt when half the coals were lost he lost half the freight, but he had got the other half already in his pocket. I cannot conceive how by any process of reasoning on the one hand the shipowner can be taken to have insured what he had already got, or, on the other hand, how the charterer should be called upon to pay a higher freight than he had contracted to pay, namely, 42s. per ton.

I do not think that the case of *Kirchner v. Venus* (') has any bearing upon the case before your Lordships. Of course any opinion of Lord Kingsdown is always cited by those who can cite it as an authority at all for their proposition, and it certainly carries with it great weight. But Mr. Justice Brett, whose opinion is of very great value, I think, in assisting your Lordships to arrive at a correct view of this case, dealt with *Kirchner v. Venus* (') in the mode in which, in my opinion, it ought to be dealt with, and in which all judgments should be dealt with, namely, by taking it as applied to the subject-matter. What Lord Kingsdown there says is this: in the first place, it is not that prepayments are not freight, but that they are not the same thing as freight, having all the legal incidents of freight; and, in the second place, there is the case of lien. Applying

(') 12 Moo. P. C., 361.

240] Lord Kingsdown's opinion to the *subject-matter you will not find him saying that prepaid freight is not freight,—because it *is* freight to all intents and purposes. In settling the account you say, "That is a part of the freight," in this case and in every other case where freight comes to be adjusted. And what you find to be the course of shipowners and merchants dealing in this way with regard to the afreightment of vessels is this; the real transaction takes this form, the risk of so much as is prepaid is transferred to the charterer instead of being at the risk of the shipowner, the latter taking the money and keeping it in his pocket under all circumstances, whatever may happen. In respect of that an allowance is made for insurance. When you come to look at it in this point of view you see how this course of proceeding has naturally arisen. And, in truth, if we were to say that the plaintiff had not insured this freight, which he has entirely lost, on account of the total freight earned not amounting to more than a set-off to the half that has already been paid, if we were to say that that was the result, we should, as it appears to me, disturb the whole of those contracts which are made in the form of the one we have now before us in this case, and which seem to have become tolerably frequent, we should be in effect saddling the charterer before us, with regard to what was the position between him and the shipowner, with a greater payment than any he had contracted to make.

Some difficulty, no doubt, arose in the mind of one of the learned judges in the court below, Mr. Baron Amphlett, in consequence of the charterer having himself effected an insurance on the cargo of coals in the form of an insurance of the coals, value increased by freight prepaid; so that he said it appeared to him that the result would be to make the different underwriters (it might have been one underwriter, of course) by whom the insurance had been effected pay twice over in respect of this loss. Whether or not the underwriters could have resisted the claim I will not stop to inquire, because I think there is another answer to the argument. Mr. Justice Brett has pointed out that answer also, as he has dealt with almost every part of the case, very clearly. He says the insurance so effected was effected on a valued policy, and if there be any apparent lack of justice towards the underwriter with reference to recovering upon 241] that policy, it *arises from the law allowing these valued policies. This being taken as a valued policy, payment had to be made, although it might possibly be that the insurer's interest was not such as, but for the law allow-

ing valued policies, could have been made the subject of contract with the underwriter.

My Lords, we have nothing to do with that here. All we have to do in the present case is to consider what is the engagement which the assured (here the plaintiff) has entered into with those who have accepted the risk, and for that purpose to look at the contract which was entered into between him and the charterer; and when we look at that contract, the whole matter comes out plainly, that what is insured is exactly that which has been lost to him in consequence of the perils of the sea.

LORD PENZANCE: My Lords, the appellant brings his action upon two policies of insurance, one on "freight valued at £2,000," the other on "freight payable abroad valued at £2,000;" and he claims a total loss. The answer of the underwriters is that the loss is only partial, as he might lawfully have claimed a part of the freight said to have been lost, from the charterer of his vessel, and whether he could do so or not depends on the terms of his charterparty.

There is, therefore, in substance but one question in this case—the proper construction of that charterparty as to the amount that became ultimately payable for freight in the events that happened.

It is admitted on both sides that freight was earned in respect of a quantity of coals delivered, to the extent of what may in round numbers be called half the cargo; but it is contended, on the one side, that as freight to that amount had already been paid in advance, there was nothing more for the merchant to pay; while it is contended, on the other, that the money so paid in advance was not *all* paid in discharge of such freight as might ultimately turn out to be earned, but was to the extent of a half only paid on that amount; and consequently that there still remained a quarter of the entire freight for the merchant to pay.

*This latter view has been upheld by the Exchequer [242 Chamber in the judgment now under appeal, and I am of opinion that it cannot be sustained.

I will test it, in the first place, by considering what results will flow from its adoption.

It is incontestable that if, in accordance with this proposition, the merchant should actually pay, in addition to the half freight previously advanced by him, another quarter of the entire freight, the result would be that the shipowner would have received three quarters of the entire freight, though he had earned only half of that freight by carrying half the cargo safely to its destination. This result is so

231] *Had the underwriters pleaded and proved that the insured did not disclose this peculiar nature of the charterparty making the risk double what in ordinary circumstances it would have been, that would have been a good defence. They have not so pleaded, and therefore we must act on the supposition (whether correct in fact or not I do not know) that the charterparty was disclosed, in which case, if the underwriters misconstrued it, it was their own fault. But, as already said, I do not think they have misconstrued it; and what is the true construction of the charterparty is really the matter in dispute in this cause.

It is very difficult to argue on the construction of such an instrument, or to do more than to state one's view of what it means. The words are, "freight to be paid on unloading and right delivery of the cargo at and after the rate of 42s. per ton on the quantity delivered," and had it stopped there, I think there would be no room for doubt that it meant 42s. per ton for each ton delivered, and nothing for those not delivered, so that a partial loss of the goods would be a partial loss of a proportionate part of the freight. But it goes on, "such freight to be paid, say, one half in cash on signing bills of lading, less" certain deductions, including 5 per cent. for insurance. That clearly expresses that 21s., less these deductions, were to be paid for every ton put on board, without reference to whether it was all delivered or not, "and the remainder on right delivery of the cargo." I think that means the remainder of the 42s. per ton on the right delivery of each ton. Had the broker who drew up the charterparty adopted language similar to that used in *Byrne v. Schiller* (¹), and said, "the amount paid on signing the bill of lading to be deducted from freight on settlement thereof," it would have clearly expressed what is now said to have been the intention. But in the absence of those or any similar words, I think that is not the meaning of the words used. The construction contended for by the appellant seems to me forced and unnatural, and not that which mercantile men would put upon such a contract.

I do not like to make assertions as to what mercantile men would say, knowing as I do that other judges would 232] make *contrary assertions; and we have very little to assist us in ascertaining what merchants really would think. I see that my Brother Cleasby, in his judgment in the Exchequer Chamber, attaches weight to the conduct of the master in delivering up the coals without payment of the 21s. per ton, as evidence of the understanding of merchants

(¹) Law Rep., 6 Ex., 20, 319.

on the construction of the charterparty. And this was repeated on the argument at your Lordships' bar. I am not sure that a legitimate argument as to the mercantile understanding can be deduced from the conduct of parties after the dispute has arisen, and in no case do I attach much weight to the conduct of the captain's seeking to charge underwriters, whom all captains are too apt to think their legitimate prey; I should myself attach more weight to the conduct of the insurance brokers who worded both policies as if they believed that the risk as to the freight and as to the enhanced value of the goods was the ordinary risk, subject to a partial loss on the loss of any part of the goods. Had De Mattos and his brokers thought that no part of the prepaid freight, which formed more than half of the value which he insured, was to be lost till more than one half of the goods had been lost, so as to render the risk as to this much less than the risk as to the goods themselves, he would, I should think, not have shaped his policy so as to lump these two unequal risks together. He would, I think, have severed the two in his policy and have required that the premium for the smaller risk should be less, instead of insuring, as he did, as if his risk as to the enhanced value of the goods was the same as that on the goods themselves.

I have only farther to observe that the terms of the charterparty, "42s. per ton delivered, to be paid one half in cash on signing bills of lading" are exactly equivalent to saying "21s. to be paid on every ton put on board." If no disaster happened the number of tons delivered would be the same as the number of tons put on board; but I do not think it an accurate statement to say that the payment was to be one half of the estimated freight, which is the phrase used by each of the judges in the Court of Common Pleas, and I cannot but think that a fallacy lurks under this, to my mind, inappropriate expression.

I have only to add, that where there has been such a difference of opinion on the question of what is the intention of the parties as expressed in this charterparty, it is impossible to say that the meaning is clear. It will appear different to different minds. I can only say that to me the intention appears to be to express that which the respondents say has been expressed. And such being my opinion, I answer your Lordships' question by saying that there was only a partial loss of the subject-matter of insurance.

March 30. LORD CHELMSFORD: My Lords, this appeal is from the judgment of the Court of Exchequer Chamber, in

an action brought by the plaintiff on two policies of insurance to recover a total loss of freight. The Court of Common Pleas unanimously gave judgment in favor of the plaintiff. The Court of Exchequer Chamber reversed that judgment by a majority of three to two, holding that there was only a partial loss of the subject-matter of insurance, and the learned judges who have been summoned to assist your Lordships have differed in opinion; so that in the result there are five judges in favor of the plaintiff and four in favor of the defendant. In this difference of opinion, it is impossible not to feel that the question is one of some difficulty. It appears to me to depend altogether upon the proper construction of the charterparty: [His Lordship stated that instrument and the facts of the case.]

In considering the question it is necessary in the first place to determine the character of the payment which was made by the charterer at the time of signing the bills of lading. Was it an advance in the nature of a loan, or was it a prepayment of half the freight, the whole of which was to be earned by the unloading and delivery of the cargo at Bombay? It is unnecessary to consider the case of *Kirchner v. Venus* (1) which was often referred to in the course of the argument, but which appears to me to have turned entirely upon the question of lien, so that the language used with respect to payments made by the shippers of goods at the port of discharge not acquiring the legal character of freight (2) must be received with some qualification. But this case is altogether removed from the authority of *Kirchner v. Venus*, *because here the parties, by their charterparty, have agreed that the payment shall be the advance of half the freight, and that the shipowner shall have an absolute lien for freight. The charterparty contains a provision for the charterer to deduct from the payment of half freight 5 per cent. for insurance, and Mr. Justice Blackburn, in his opinion delivered to the House, stated "that it had always been held that a stipulation that the merchant is to insure the amount, is almost conclusive to show that it is not a loan on security of freight to be earned, but an advance of freight." There can be no doubt, therefore, that the sum paid by De Mattos was a prepayment of freight, and as such, according to settled authorities, could not be recovered back again. That portion of the freight received by the plaintiff was therefore never at risk on the voyage insured.

(1) 12 Moo. P. C., 361.

(2) 12 Moo. P. C., at p. 390.

But then the question arises what was the portion of freight which was covered by this prepayment?

On the part of the defendant it was contended that under the words of the charterparty the freight being payable not in a gross sum but after the rate of 42s. per ton of coals on the quantity delivered, the freight must be distributed over the whole cargo at the rate of 42s. for each ton, which will be equivalent to the payment of £1 1s. on every ton of the cargo put on board, leaving only £1 1s. to be paid for freight on the entire cargo delivered. If this mode of calculating the freight is adopted the plaintiff's loss would of course be only a partial one.

But I am not disposed to take this view of the stipulation as to payment of freight in the charterparty. I think that the freight payable is the freight upon the whole quantity of coals delivered at the rate of 42s. per ton, and the part which was prepaid was assumed upon an estimate of half of that quantity. If the parties had intended that the prepayment should be calculated upon the footing of one half of the cargo, at so much per ton, nothing would have been easier than to have expressed this in words. The bill of lading was signed for 2,178 tons, the half freight was to be paid on signing the bill of lading, and the receipt was indorsed on the bill of lading. If the prepayment was meant to be applied to half the rate of freight over the whole number of tons of coal shipped, the amount could have been easily ascertained and the intention clearly expressed. The manner in [235 which the half of the freight was agreed upon, satisfies me that the sum paid was taken generally as representing one half of the freight of the entire cargo, at the rate of 42s. per ton.

This being my view of the case, it follows that the plaintiff never had more than half the freight as a gross sum at risk, on the voyage insured. If all the coals had been delivered he would have had to receive the amount of the whole agreed freight minus the £2,286 already paid. In the event which occurred, he had secured himself against the loss of one half of the freight by the prepayment; the only insurable interest in the freight which remained to him was the unpaid half, the whole of which he lost by the perils of the seas, and therefore his loss was a total loss.

I think the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD HATHERLEY: My Lords, I concur entirely in the view which has been taken of the case before us by my noble and learned friend who has preceded me in expressing his opinion upon it.

The two points to be considered are, first, what is the insurance that has been effected by the policy and the subject-matter thereby insured; and we are led, in the consideration of that point, to the farther question as to what was the contract between the insurer and the person with whom he bargained, as the charterer of the ship, in order to ascertain what were the perils of the sea against which the assured desired so to protect himself.

Now, my Lords, we must bear in mind in this inquiry, in the first instance, that if there be any question or doubt (I think in truth we shall find there is none) as to what the subject-matter of insurance is, then on principle it is to be held in all cases that that in respect of which the insurance is made is that which is capable of being a subject-matter of insurance, namely, that which is at risk; and that in regarding the contract of insurance, we must not assume, and we cannot in any way consistently with law assume, that the assured is endeavoring to effect a policy upon that which is at no risk whatever. Next, when we come to look at the contract itself, it being a contract of freight, we have to 236] *remember that from a very early period, as long ago, it was said during the argument, as the time of Charles II.—at all events for a very long time—it has been settled in our maritime law that prepaid freight cannot be recovered back. I think when we consider these two points, that on the one hand that is to be taken as insured which is at risk, and on the other hand that prepaid freight cannot be recovered back, we shall be led very easily and safely to the solution of the difficulty which appears to have arisen in the case before us.

We have now had the advantage of hearing the opinions of the several judges, who, both in the court below and afterwards in assisting your Lordships' House, have expressed their opinions upon the matter; and we have had the benefit of hearing the arguments upon which these opinions were founded, as well as the arguments which were adduced at the bar. Therefore it may well be that a subject which has been one of considerable doubt, and has been supposed to be one of difficulty, before arriving at this stage of the argument, may without presumption on my part appear to me to be free from difficulty as regards the final conclusion we are bound to arrive at.

My Lords, in the first place the contract of insurance is an insurance of freight. The question is, what is that freight which is so insured? To answer that question we look at the charterparty which was entered into between the ship-owner and the charterer; and that charterparty we find to

be a contract or engagement on the part of the charterer, who was about to enter into the engagement with reference to a cargo of coals to be delivered at Bombay, that he will pay freight "on unloading and right delivery of the cargo, at and after the rate of 42s. per ton on the quantity delivered," neither more nor less. He is not to pay more freight than at that rate upon whatever may be delivered. That is the sum and substance of his engagement. But then as to the mode of paying the freight, he proposes to pay it in this way: instead of waiting until the time of delivery as regards the whole cargo, he engages that he will pay "one half in cash on signing bills of lading, less four months' interest." That is the discount, therefore, on the payment in respect of its being made at once, and before the period of delivery at Bombay. "Less four months' interest, *and less [237 5 per cent. for insurance, and 2½ per cent., &c., in lieu of consignment at Bombay." That last 2½ per cent. we need not consider. Therefore it is less four months' interest and 5 per cent. for insurance.

Now what seems to have grown up to be the practice in shipping transactions of this character is founded very probably upon the determination of the courts of law, that prepaid freight cannot be recovered back. What seems to have happened is, that the parties who are desirous of having the freight prepaid to a certain extent, in order to avoid during a long voyage being kept for a long time out of their money, have entered into an arrangement with the charterer to this effect: I shall wish to have my money in hand, to some amount at all events, upon this charter of freight; I therefore stipulate with you that some of this money shall be paid down (in this case one half), but I will give a rebate of interest, which is in effect discounting this prepayment; and I will give a farther rebate of insurance, because, inasmuch as you are making this payment, and inasmuch as you cannot recover it back in the event of there being a loss of the cargo, the risk becomes yours and not mine. What would ordinarily be the risk of the shipowner with regard to the freight so prepaid is transferred in this way to the charterer, and the shipowner has the money in pocket; and having the money in pocket, and seeing that it cannot be recovered back, he is assured of that—that is at no risk. Whatever loss happens at sea, he retains that money; and therefore, if there be a total loss of the whole cargo, the loss in respect of this prepayment of freight falls upon the person who has so prepaid it. Consequently a custom seems to have grown up of allowing a sum by way of insurance,

Putting out of account all such irrelevant suggestions, I shall ask the attention of your Lordships for a very short time to the words of the charterparty. It provided for the loading of a full cargo of coal for Bombay, freight to be paid on unloading and right delivery of the cargo, at and after the rate of 42s. per ton of 20 cwts. "on the quantity delivered," and it went on, "such freight to be paid, say one half in cash on signing bills of lading, . . . and the remainder on right delivery of the cargo, less loss of coals," &c. I omit words repeatedly read, which seem to me not material for the purpose of the argument.

The question is, half of the cargo having been lost by perils of the sea, and half duly delivered at Bombay, and the owner having received payment for the carriage of one half of it, had he any farther claim upon the charterer, or was the money received in England applicable to discharge the freight which had been earned at Bombay? The captain thought it was, and delivered the cargo without claiming any farther freight, and the plaintiff brought his action on his policy as for a total loss. I think he was warranted in doing so, and is entitled to recover. I should add, that in the receipt for the freight paid by the charterer, it is described as "the sum of £2,286 10s., being advance of half freight on within shipment."

It seems to me that the purpose of the charterparty is very clear. It was to secure to the owner an integral freight for the voyage; the amount of which was approximately fixed according to the value of the coals to be put on board and intended to reach Bombay; but it was to be paid half in advance on signing bills of lading, and the remainder on right delivery of the cargo. What was the risk against which the owner insured? What was the purpose of his insurance?

He received half of the freight; and having received it, it was his absolutely, and was irrecoverable under any circumstances by the charterer. This peculiar doctrine of the English law is abundantly established by *De Siloale v. Kendall* (¹), *Byrne v. Schiller* (²), and many other cases, to which 250] full reference is made in the able *opinion of Mr. Justice Brett. The owner had thus got prepayment of a moiety of the entire debt which the charterer had contingently incurred for the hire of the ship, or a portion of it, and which might be described, reversing an ordinary legal phrase, as "*Debitum in futuro, solvendum in presenti*." That prepayment was applicable generally to the freight,

(¹) 4 M. & S., 37.

(²) Law Rep., 6 Ex., 20; Ex. Ch., 319.

which, although a single liability, had been divided for the purposes of convenience into the "one-half" of it, and "the remainder" to be dealt with in different ways and at different times. And when, by the perils of the sea, the owner has been disabled from fully completing his part of the contract, and failed to earn more than "the one half" by delivery at Bombay, that being the express and essential condition of the charterer's liability, the prepayment became applicable to answer the only demand he could maintain, the charterer owed him nothing, and he fell back properly on his policy for "the remainder" of the freight which, not having earned it according to his bargain, he was unable to demand from the charterer.

This appears to me to be a reasonable view of the matter, and the terms of the charterparty justify, I think, no other. The only thing at risk was the unpaid balance, and when that was hopelessly and totally lost, the liability of the insurer was complete.

There has been much discussion as to the meaning of the word "freight" in the charterparty, and it has been represented as having been in the nature of a loan or of a payment, not for the carriage of the goods, but for the taking of them aboard the vessel and agreeing to carry them. But I see nothing to warrant the adoption of such a view. "Freight" has a definite meaning. It is described by Mr. Phillips (*), in a passage cited by Chief Justice Bovill, as signifying "the earnings or profit derived by the shipowner or hirer of the ship from the use of it himself or by letting it to others to be used, or by carrying goods for others;" and by Lord Tenterden in *Flint v. Flemyng* (*), as importing "the benefit derived from the employment of the ship." In this charterparty "freight" surely means nothing else. It is "the profit to be derived by the shipowner" on the delivery of the cargo, at the end of the voyage, for "the use of the ship, in conveying the coals of the charterer." I agree with the clear words *of Baron Cleasby in the [251] Court of Exchequer Chamber: "We cannot depart from the settled meaning of the word 'freight' and the meaning expressly given to it in this charterparty, namely, the amount to be paid at the end of the voyage for what is ready for delivery at the stipulated rate. This had been wholly satisfied by the advance made, and so the shipowner was entitled to receive no more, and the captain was right in delivering the half cargo free of freight" (*).

The charterparty speaks, first, of "freight" generally as

(*) Chap. III., sect. 2.

(*) 1 B. & Ad. 45.

(*) Law Rep., 9 C. P., 574.

to be paid "on unloading and right delivery," and it is "such freight" which it afterwards divides into the "one half" and "the remainder." Why should we strive to put an unnatural and unaccustomed meaning on an ordinary word which is accepted by the parties as it is commonly understood, when they give and take a receipt for the money paid, not as a loan, or a payment for putting the cargo on board, or for accepting the goods without delivery, but as being "advance of half-freight on within shipment," plainly pointing to an entire freight on the entire cargo to be fully or partially earned and paid on the full or partial delivery of that cargo at Bombay.

Reliance has been placed on some expressions of Lord Kingsdown in *Kirchner v. Venus* ⁽¹⁾, in which he states that "freight is the reward payable to the owner for the safe carriage and delivery of goods," and that "a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire the legal character of freight, because it is described by that name in a bill of lading." Any opinion of Lord Kingsdown, even an *obiter dictum* like this, is entitled to high consideration, and I do not think it at all necessary to impeach the correctness of his words for the purpose of sustaining the view I am submitting to your Lordships. Immediately after using them he goes on to recognize the right and the power of those who enter into shipping agreements "to supersede by a special contract the rights and obligations which the law attaches to freight in its legal sense," and that, even assuming the accuracy of his definition, seems to me exactly what the parties have done in the present case. They have 252] *made a contract which unmistakably deals with the prepayment as of "freight" and nothing else; and whatever might have been the legal force of the term if it stood by itself, and without the specific directions as to the "one half" and "the remainder," those directions equally give to both the character of "freight," although the first half is to be paid before delivery. So that I do not conceive the *dictum* of Lord Kingsdown to be adverse in reality to the contention of the appellant.

And that contention, on this particular point, is strongly sustained by several cases, to two of which I shall briefly advert. In *De Silvale v. Kendall* ⁽²⁾ a charterparty provided that the charterer should pay "for the freight and hire of the vessel, a specified sum in advance," and "the

⁽¹⁾ 12 Moo. P. C., 390.

⁽²⁾ 1 M. & S., 37.

residue on the delivery of the cargo." The provision in that instrument was substantially the same as that with which we are dealing, and it was contended there, as here, that the advance was not freight, but in the nature of a loan. And there Lord Ellenborough said: "If the charterparty be silent, the law will demand a performance of the voyage, for no freight can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words sufficiently intelligible to that end, that a part of the freight (using the word 'freight') should be paid by anticipation, which should not depend on the performance of the voyage, may they not so stipulate?" Every word is applicable to the circumstances of this case; and, as Lord Ellenborough insisted on deciding on the terms of the charterparty before him, and declined to consider other cases applying, as he said, "to other forms of covenant," so I think your Lordships may safely found your judgment upon the express words of this particular contract. In that case, also, the judges held expressly that there is no doubt of the competency of parties to stipulate for part payment of the freight before it can be known whether any freight will accrue or not. So, in *Byrne v. Schiller* (*), the latest case bearing on the present, the charterparty provides that a vessel has to be sent on a voyage at a specific rate of freight, "such freight," as here, to be paid partly in advance and "the remainder on right delivery of the cargo at the port of discharge." And then the court dealt with the payments as "on account of freight." *The circumstances of those cases make the observa- [253
tions of the judges directly applicable to the case before us, and they and others show also that a stipulation to pay freight in advance and before delivery is not only legal, but of common use amongst commercial people.

I might have been disposed to dwell on the inconvenience possible to arise in a case like this from the adoption of the view of the respondents. It would plainly involve, in certain circumstances of insufficient delivery, from any cause, serious loss to the charterer, which it would be difficult to suppose him to have designed or contemplated as just and reasonable, but this point has been so well put by my noble and learned friend who last addressed the House that I shall not occupy time by dwelling upon it. I am satisfied, with much deference to the adverse view which has been so strongly supported, that, on the construction of the charter-

(*) Law Rep., 6 Ex., 20; in Ex. Ch., 319.

party alone, the plaintiff is entitled to recover; and I prefer to base my opinion on that sufficient ground.

I think the judgment of the Exchequer Chamber should be reversed.

LORD SELBORNE: My Lords, the difficulty in this case (for certainly I felt some difficulty during the argument, and it has been the subject of much difference of opinion between judges of high authority) arises out of the peculiar rule of English mercantile law, that an advance on account of freight to be earned, made at the commencement of a voyage, is, in the absence of any stipulation to the contrary, an irrevocable payment at the risk of the shipper of the goods, and not a loan repayable by the borrower if freight to that amount be not earned.

The authorities referred to by Mr. Justice Brett certainly establish this general rule (whether reasonable in the abstract or not); and it must be taken that payments in advance, such as that which was made by the charterer in the present case, are in this country generally made and received, as between the parties to contracts of affreightment, upon this understanding.

It is, however, remarkable that none of the authorities 254] seems *to touch the precise question in this case, viz., whether the charterer, under a contract like that before your Lordships, has a right to deduct the whole amount paid by him in advance from any freight which may actually be earned in case of a loss of part of the cargo; or whether such advance ought to be apportioned over the whole cargo delivered on board, so that the loss of a proportionate part of it will fall upon the charterer if part of the cargo is lost. In that case it does not seem to me to be material, or to create any difficulty in the application of the principle, whether the advance is of an aliquot part of the estimated freight or of a gross sum of money.

Mr. Justice Blackburn, if I understand him rightly, thinks that on principle the latter view is that most consistent with the rule established by the authorities, and that there is nothing in the express contract between these parties to justify a different conclusion. The actual settlement between the shipowner and the charterer did (indeed) take place upon the opposite view; but the insurer was no party to that settlement; and what was done *inter alios* could not enlarge his liability. It may be that the principle on which that settlement proceeded was according to a general usage of trade; but of this I find no proof. I am by no means clear that the reasoning of Mr. Justice Blackburn is fully

met by the observation of Mr. Justice Brett, that if this be not the correct principle, "the charterer must *in effect* pay more than £2 per ton in every case except where the whole cargo is delivered." If the whole cargo is lost, he must "in effect" pay £1 a ton on the goods put on board, though under the contract no freight whatever has been earned. The introduction of the words "in effect," when the question is as to the legal consequences of an anomalous rule not expressed in terms by the contract, may perhaps be fallacious.

On the other hand, the conclusion of Mr. Justice Blackburn rests entirely upon the ground that in a contract so worded as the present, a stipulation tantamount to that expressed by the words, "the amount paid on signing the bill of lading to be deducted from freight in settlement thereof," ought not to be implied if it is not expressed. I am unable to adopt that opinion; and, upon the whole case (though I should have thought it more *satisfactory if there had [255 been some authoritative source of information as to the usage of trade) I think that the view of the proper construction and effect of such a contract taken by the majority of the learned judges and by your Lordships, is the more reasonable, and that which is most in accordance with the natural meaning of the words of the charterparty, and with the probable intention of the contracting parties. If so, there was clearly in this case, a total loss of the whole interest of the assured in the whole subject-matter of the insurance; and the judgment of the Court of Exchequer Chamber ought, therefore, to be reversed.

Judgment of the Court of Exchequer Chamber reversed, and judgment of the Court of Common Pleas affirmed.

Lords' Journals, 30th March, 1876.

Solicitor for appellant: *William Nash.*

Solicitors for respondent: *Argles & Rawlins.*

[Law Reports, 1 Appeal Cases, 256.]

H.L. (E.), May 4, 1876.

[HOUSE OF LORDS.]

256] *THOMAS W. RHODES, Plaintiff in Error; and GEORGE P. FORWOOD and WALTER PATON, Defendants in Error.

Contract—Agency—Control over Property—Principal—Sale of the Subject of the Agency.

Where two parties mutually agree, for a fixed period, the one to employ the other as his sole agent in a certain business, at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named.

A. and B. agreed "in consideration of the services and payments to be mutually rendered," that for seven years, or as long as A. should continue to carry on business at the town of L., A. should be the sole agent at L. for the sale of B.'s coals, and that B. would not employ any other agent at L. for that purpose. There were stipulations in the agreement that B. should have the entire control over the prices for which, and the credits at which the coals were to be sold; and that if A. could not sell a certain amount per year, or B. could not supply a certain amount per year, either party might, on notice, put an end to the agreement. At the end of four years, B. sold the colliery itself. In an action by A. for damages for breach of the agreement, thereby occasioned:

Held, that the action was not maintainable; for that the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to L.

ACTION for damages for an alleged breach of contract.

Rhodes was the owner of the Risca Colliery, Forwood & Paton were brokers in Liverpool. The declaration set forth an agreement dated the 24th of September, 1869, of which the material parts were the following: "In consideration of the services and payments to be mutually rendered," it was agreed: 1. "For the term of seven years from the 1st day of November next Messrs. Paton & Forwood, or such one of them as shall continue to carry on business in the name of that firm at Liverpool, shall and will be the agents of Mr. Rhodes at Liverpool for the sale of the coals of all kinds produced at the Risca Collieries, subject nevertheless to the determination of such agency in manner herein-257] after mentioned. *2. During the continuance of such agency Mr. Rhodes will not employ any other agent for the sale of coals in the port of Liverpool, save in respect of contracts now existing, all of which are expressly exempted from this agreement. 3. That the rates at which coal is to be sold, and all special terms with respect thereto, and the purchasers, and amount of credit in the case of sales other than for cash, are to be subject to the approval of Mr. Rhodes, as are also the rates to be charged for shipping or delivery of coals. 4. That Messrs. Forwood & Paton will

not during the continuance of their agency act as agents for the sale of any other steam coal without the written consent of Mr. Rhodes, to be obtained for each transaction." By the 5th article, the commission was fixed at £3 per cent. to include all the charges to be incurred by the agent. 7. "That in case during the first or any subsequent year of the agency hereby created, reckoning from the 1st of November to the 1st of November, Messrs. Forwood & Paton shall not have, *bona fide*, sold 50,000 tons of coals on Messrs. Rhodes' account, in conformity with the terms of this contract, it shall be lawful for Mr. Rhodes at any time prior to the first day of May in the ensuing year to determine the said agency at the expiration of six months from the delivery of a notice in writing to that effect," . . . "and in the event of Mr. Rhodes not being able to supply with due dispatch the quantity and quality of coal, not exceeding 75,000 tons in all, in any one year, which may have been sold on his account in conformity with the terms of this contract (saving in the case of strikes and inevitable accidents), it shall be lawful for Messrs. Forwood & Paton in like manner" to determine their agency.

The agreement was acted upon by the parties until the 1st of March, 1873, when the defendant contracted to sell the Risca Colliery, and the vendees took possession of it on the 22d of that month, and from that time the plaintiffs had ceased to be employed in the sale of the coals.

Forwood & Paton having brought their action on the agreement, it was referred to a barrister, who stated a case for the opinion of the court. Upon argument in the Court of Exchequer, judgment was given by Mr. Baron Bramwell, and Mr. Baron Cleasby, for the defendant Rhodes. Upon error to the Exchequer Chamber, that judgment was [258 reversed by Lord Coleridge, Mr. Justice Lush, and Mr. Justice Archibald. *Diss.* Mr. Justice Quain. The case was then brought up on error to this House.

Mr. *Benjamin*, Q.C., and Mr. *Patchett*, for the plaintiff in error: The fact that the agreement provided one particular mode of putting an end to it when certain circumstances should occur, did not prevent the parties from determining it under all other circumstances. There were several matters not provided for in the contract. Rhodes was not bound to send all or even any of his coal to Liverpool. If he found a market elsewhere, at which he could get a higher price, he might send all the produce of his colliery to that more profitable market; so under the words of the articles themselves, he was entitled to regulate the prices and the

terms of credit on sales, and by either of these means he might really have put an end to the agency. The only stipulation was that if he sent coals to Liverpool for sale he was to employ Forwood & Paton as his agents to sell them. The stipulation as to seven years referred to that and to no other matter; he was not bound to work his mine at all, if it appeared that he could not work it except at a loss—and if so, the principle of his own advantage applied in the other case, and, as he might leave off working his mine, he might sell it and get rid of it altogether. The case of *Burton v. The Great Northern Railway* (1) is entirely in favor of this construction of the contract, and *Ex parte Machure, In re the English and Scottish Marine Insurance Company* (2), is directly in point. There, a person engaged to act as agent for the insurance company for five years at a fixed salary, and also on a commission of 10 per cent. Before the five years expired the company was wound up, and he was held not entitled to prove against the company for the loss of his commission during the remainder of the term. Here Forwood & Paton might cease to carry on business at Liverpool, and that would put an end to the contract; Rhodes was equally entitled to put an end to it by selling his colliery.

259] *Mr. Manisty, Q.C., and Mr. J. C. Bigham, for the defendants in error: This was a valid agreement for employment in a lawful business. It was made for the term of seven years absolutely; during that period Rhodes bound himself to employ Forwood & Paton as his agents at Liverpool for the sale of all his coals raised from the Risca Colliery; during that period they bound themselves to act as his agents at Liverpool, to act for him and no one else. The agreement professed to be made “in consideration of the services and payments to be mutually rendered.” That the contract was intended to be a valuable one was shown by the fact that if the agents did not sell at least 50,000 tons of coal in a year, or if Rhodes did not supply, if they were sold, up to 75,000 tons in a year, the contract might be determined by a six months’ notice. But it was only to be determined on notice, and for a matter expressly agreed upon. That showed that it was intended to be a continuing contract—that is, continuing up to the end of the time mentioned at the commencement of it. Neither party had a right to put an end to it at his mere pleasure by rendering himself unable to perform it. The cases cited have no application to the present. In *Burton v. The Great Northern*

(1) 9 Ex. 507.

(2) Law Rep., 5 Ch. Ap., 737.

Railway Company ⁽¹⁾ the court held that the contract as set out in the declaration was not proved, and that in truth it was only a unilateral contract, which certainly was not so here; and in the case of *Maclure* ⁽²⁾ the company did not wilfully break the contract, but became by law incapable of performing it. It was true that to Rhodes was reserved the power to control the prices, and also the credits at which the coals were to be sold, but he could not do that *mala fide*, nor could he *mala fide* send his coals to another market, and avoid sending them to the market of Liverpool. In *Stirling v. Maitland* ⁽³⁾ an insurance company had entered into an agreement with C. D. to appoint him an agent for insurances at Glasgow, jointly with A. B., and undertook to pay C. D. a certain sum if A. B. should be displaced. The company transferred its business to another company, wound up its affairs, and dissolved; it was held that this was a displacing of A. B. which enabled A. B. *to re- 260 cover. Lord Chief Justice Cockburn there said ⁽⁴⁾: "I look on the law to be that, if a party enters into an arrangement that can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the engagement can be operative;" and he added that it would have been different if the company had come to an end from other and external circumstances. That principle must govern this case. Rhodes engaged that the agents should be his sole agents. [LORD O'HAGAN: "At Liverpool."] Yes, and they put themselves under a corresponding obligation. Under such circumstances Rhodes was not entitled to disable himself from the performance of his contract. The state of facts under which the agreement was made, continuing, Rhodes was bound to continue to perform it, and is responsible in damages if he does not. Here Forwood & Paton stipulate, not only that they will act as brokers for Rhodes for the sale of the Risca coals, but they will not act as brokers for any one else. That was a valid consideration for a binding promise on his part. They had to incur a large expense in enabling themselves to fulfil their part of the contract, and it cannot be contended that as soon as they had done so, he might sell his colliery, and so deprive them of all means of reimbursing themselves. That argument would in truth amount to saying that there was no contract whatever. Such a thing as the sale of the

⁽¹⁾ 9 Ex., 507.⁽²⁾ Law Rep., 5 Ch. Ap., 737.⁽³⁾ 5 B. & S., 840.⁽⁴⁾ 5 B. & S., 852.

colliery was never thought of by either party when the contract was made, and, therefore, no positive stipulation was introduced concerning it. But there can be no doubt that at that time both parties expected and intended that the contract should endure for the full term of seven years. The only matters on which the contract could be terminated were specially provided for. *McIntyre v. Belcher* (*) exactly applies here. That was a case where A. sold to B. his practice as a surgeon. A. was to introduce B. to the patients, and to receive for the first four years one-fourth part of the gross annual earnings, provided they did not fall below £300. B. discontinued the practice, and it was held that he could not lawfully do so, for that there was an implied contract to keep it up, and an allegation in the declaration 261] ration that by * "his own acts and defaults" he had disabled himself from performing his agreement, was held properly to set forth the cause of action. The principle there was broadly stated by Lord Chief Justice Erle, and was in accordance with the opinion he had always expressed on the subject of such an agreement (*). Even in the case of *Churchward v. The Queen* (*), where the great difficulty arose upon the action of the Parliament, Lord Chief Justice Cockburn said (*) that though a contract might appear to be binding only on one party, there must be "corresponding and correlative obligations" on the other; and that was so here.

By the provision affecting the termination of the contract upon notice, it may be that the plaintiffs would be bound to refrain from acting as agents for any other coal owners during a period of many months, and in that respect they might suffer serious damage.

Mr. *Benjamin* was not called upon to reply.

THE LORD CHANCELLOR (Lord Cairns): My Lords, I do not think that any of your Lordships can have any doubt as to the decision which the House ought to give in the present case. The case itself lies in an extremely short compass. As regards its general history it may be stated thus: There is a colliery owner in the south of Wales who is anxious to place the produce of his colliery in the most advantageous way, and to obtain a sale for the coal taken from it in the Liverpool market, as well as in other places. He enters into an agreement with certain gentlemen in Liverpool,

(*) 11 C. B. (N.S.), 654; 32 L. J. (C.P.), 254.

(*) Law Rep., 1 Q. B., 173.

(*) Ibid., 195.

(*) See his opinion in *Beckham v. Drake*, 2 H. L. C., at p. 607.

the present respondents. I shall have to refer a little more particularly to the details of that agreement afterwards, but the outline of it is this, they are to become his agents for the sale of the coal sold in Liverpool for a period of seven years; during that time he will not employ any other agent in Liverpool to sell his coal, and, during that time, they will not act as agents without his consent for the sale of any other steam coal: they are to be paid a price for their services by a percentage upon the value of the coal sold, and for that price they are to *undertake all the expense, [262 of an office, and of advertising and commending the coal to purchasers, which may have to be incurred in Liverpool.

My Lords, the employment commences upon that footing, and the case finds clearly that the respondents were at considerable expense in bringing the coal into the Liverpool market, and before the notice of purchasers. As a matter of course that expense would naturally be incurred to a greater extent in the earlier part of the term of seven years than in the later part. The employment therefore during the earlier part of the seven years would naturally be expected to be less remunerative than during the later part of that period. The employment went on for about three years and a half. At the end of that time the appellant sold his colliery, and therefore of necessity no more coal could come to the Liverpool market with regard to which he would be the principal and the respondents his agents. That, of course, was a very considerable hardship upon the respondents for the reason that I have mentioned. The expense which would fall most heavily upon them would be the expense in the earlier part of the employment, and they were deprived of the commission which they might have earned during the later years, which would have been the most productive part of their employment. But although that is a hardship upon them which naturally one would regret to see occur, still the question remains what was the contract entered into between the parties, and has there been, in what has been done, any violation of that contract?

My Lords, it is not contended that there has been any violation of any express term in any part of the contract. There is no express term in the contract from beginning to end that the appellant, the colliery owner, would send any coal to Liverpool, or any particular quantity of coal to Liverpool, or that he would continue for any particular length of time to send coal to Liverpool. As regards express contract, there is a complete absence of anything of that kind.

But then it is contended that there is an implied contract under which the appellant was bound to send coal to Liverpool, and that he has disabled himself from performing that implied contract by selling the colliery out of which the coal 263] might have *come. My Lords, that requires your Lordships to look at the whole contract, and to discover, if you can, whether there is any such implied contract as is suggested.

Now the general effect of the contract is this: Your Lordships will observe that it commences in this way, that "for the term of seven years" "Paton & Forwood, or such of them as shall continue to carry on business in the name of that firm at Liverpool, shall and will be the agents of Mr. Rhodes at Liverpool for the sale of the coals of all kinds produced at the Risca Collieries." I stop there for the purpose of saying that that obviously is, and indeed it was admitted to be, not a contract that they would be the agents of Rhodes for the sale of Risca coal of all kinds wherever the sale should take place, but that they would be the agents for the sale in Liverpool of such of the coal as was sold in Liverpool; and, farther, that it is obviously a contract that they will be the agents of Rhodes for the sale of coal which is produced at the Risca Colliery while the Risca Colliery is his property, because if it is the property of another person they could not be the agents of Rhodes for the sale of coal which did not belong to Rhodes.

Farther than that, the contract is that they will thus be the agents of Mr. Rhodes for seven years with this important qualification, "Subject nevertheless to the determination of such agency in manner hereinafter mentioned." You are therefore informed at the commencement that although there is a fixed term stated, namely, seven years, means are provided in a subsequent part of the contract for terminating the agency.

Then there are two engagements, one upon the side of Rhodes and the other upon the side of Forwood, and they are the only two express engagements which I find in the contract. With regard to Rhodes, the express engagement on his part is in the second clause, "During the continuance of such agency, Mr. Rhodes will not employ any other agent for the sale of coals in the port of Liverpool, save in respect of contracts now existing, all of which are expressly exempted from this agreement." That is all which he actually and openly contracts for. He ties his hand against having any other agent for the sale of coal in the port of Liverpool. The express contract on the part of Forwood,

Paton & Co., is in the fourth paragraph: "Forwood, Paton & Co. will not *during the continuance of their agency [264 act as agents for the sale of any other steam coal without the written consent of Mr. Rhodes to be obtained for each transaction." It is a correlative contract on their part, negative also in its aspect, that, as he will not employ any other agent, so they will not act for any other principal. Now I ask your Lordships at this point to consider if the contract had stopped here, what would have been the result? Both parties would have been tied and bound for seven years, the one not to employ another agent, the other not to act for another principal.

Then it appears to have occurred to them, naturally enough, to consider—but what if the agency produces no fruit to the agents? Or what if the agents are not able to act with the energy which the principal expects? Is this state of things to go on for seven years in this case? And then to deal with that your Lordships find that the 7th clause is introduced, providing that if "during the first or any subsequent year of the agency hereby created" Forwood, Paton & Co. shall not have *bona fide* sold 50,000 tons of coal on Mr. Rhodes' account, in conformity with the terms of this contract" (that is to say, sold at prices of which the principal would approve) "it shall be lawful for Mr. Rhodes, at any time prior to the 1st day of May in the ensuing year to determine the said agency at the expiration of six months from the delivery of a notice in writing to that effect." And on the other hand, "in the event of Mr. Rhodes not being able to supply with due dispatch the quantity and quality of coal not exceeding" (not 50,000 tons but) "75,000 tons in all in any one year which may have been sold on his account in conformity with the terms of this contract (saving the case of strikes or inevitable accident), it shall be lawful for Messrs. Forwood, Paton & Co., in like manner to determine their agency." Therefore, there is not an absolute contract to employ no other agent during seven years, and an absolute contract to act for no other principal for seven years, but a contract of that kind subject to determination in the manner mentioned, the mode of determination being that which I have read, a power to the principal to resile if his agent cannot sell at prices approved by him 50,000 tons of coal in the year, and a power to the agent to resile if the principal cannot supply him in any year with 75,000 tons of coal which can be sold at those prices.

*That is the protection which the parties have pro- [265 vided for themselves with reference to the duration or the continuance of this agreement. Now I ask, the parties hav-

ing provided this kind of protection for themselves, upon what principle is it that your Lordships are to introduce into and to imply in the agreement what, it is admitted, is not found expressly there, namely, an engagement that during that time the principal will not disable himself from sending coals to Liverpool by selling his colliery to any other person? This question is asked by Mr. Manisty: Can you assume that the agents intended to leave open the right to sell the colliery without any assent on their part? My Lords, I should ask, in answer to that, another question. Can you assume that the principal, the colliery owner, meant to tie his hands for seven years against selling the colliery without either obtaining the consent of the agents, or without paying them a gross sum, the equivalent for all the profits they might make by the continuance of the engagement during the seven years? My Lords, if it was the intention that there should be an implied undertaking of that kind, how inconsistent would that have been with the express clause which I have read, the 7th clause, providing expressly in the events which are there mentioned for the determination of the agreement.

Now, my Lords, as I pointed out in the course of the argument, there are really in this agreement several risks which are left altogether uncovered, and as to some of which it was very candidly admitted by the counsel for the respondents that no provision whatever was made, and that they could not say that there was even by implication any protection against those risks. I will remind your Lordships of what those risks are. On the one hand, in the first place, the colliery owner, the appellant, might sell the whole of his coal at ports other than Liverpool and not send a single ton to Liverpool. That is admitted on the part of the respondents. They do not challenge that proposition. They say that that is an infirmity in the engagement between the parties. The agents could not have demurred or complained if every ton of this coal raised during the seven years at the Risca Colliery had been sold at Swansea, or at Southampton, or at any other port which might be suggested. In the next place, the coal might *have been sent to Liverpool, but the principal might have taken a view with regard to the price to be obtained for it which would have led him to place limits upon the coal, such as to prevent the agents selling any of it in any one particular year, and the agents might have been left in that year without any commission whatever, although having coal in stock, because the principal might have thought it expedient to

hold the coal and wait for better prices. There, again, it is admitted that that was in the power of the principal, and that the agent could not have complained. Then, again, I asked the question: Supposing the colliery owner had, by reason of difficulties arising with the workers or otherwise, chosen to close his colliery for a year, or for several years, and to wait for better times or a more easy mode of working, could the agents have complained? It was said they could not; that the colliery owner must be the judge of that. He might have taken that course without exposing himself to any proceedings for damages.

But if that is so, if any one of these three courses might have been adopted, if all the coal after it was got out of the colliery might have been sold elsewhere, if the colliery might not have been worked at all, if the prices required to be fetched at Liverpool might have been such that the coal could not have been sold even after it went to Liverpool,—if all that was in the power of the colliery owner, and it could not be contended that there is any provision in this contract against any of those risks, why is it to be assumed with regard to the other, the fourth risk, namely, the risk of the colliery owner, not selling his coal elsewhere piecemeal but selling the colliery itself to a purchaser, that there is an implied undertaking against that one risk, although it is admitted that there is no undertaking at all against any of the other risks?

My Lords, in point of fact an agreement of this kind, obviously, is made upon the chances of risks of the sort I have referred to, and none of which is expressed in the agreement. That which is in the mind of the parties, the principal on the one hand and the agents on the other, is, supposing it to be convenient that the business should go on and the coal find its way to the port of Liverpool, all that we require to stipulate for is that, on the one hand, the principal should have the security that his agents will *be sufficiently energetic to sell a certain quantity of [267 coal in the year, and, on the other hand, that the agents should be able, if a sufficient quantity of coal is not put in their hands for sale, to terminate the engagement. My Lords, it is obvious, now that the result is seen, that it would have been a much wiser thing if both parties, or at all events if the agents, in place of stipulating for a mode of terminating the agreement which required to work it out the lapse perhaps of a year or eighteen months, had stipulated for a more speedy power of terminating the agreement, and for the power of taking coal for other people as agents, sup-

posing the coal of the Risca Colliery was not sent to them. That, however, was for them to judge of. Your Lordships cannot reform an agreement because in the result it appears to produce consequences which possibly may not have been expected.

The simple point here appears to me to be, as it is admitted that there is no express contract which has been violated, can your Lordships say that there is any implied contract which has been violated? I can find none. I cannot find any implied contract that the colliery owner would not sell his colliery entire. Therefore I am obliged to arrive at the conclusion that the decision of the Court of Exchequer was correct, and that judgment in the action should be given as the Court of Exchequer gave it, for the defendant.

LORD CHELMSFORD: My Lords, the question to be determined is, whether the agreement upon which the action is brought involves an implied agreement on the part of the defendant that he will continue to carry on the Risca Colliery, and to employ the plaintiffs as his agents at Liverpool for the sale of the coals of all kinds produced at the Risca Colliery, absolutely during seven years. It is conceded that there is no express agreement to this effect; and the question is whether the sale of the collieries during the seven years is a breach of the agreement, the breach in the declaration being that the defendant before the expiration of the seven years disabled himself from any longer carrying out the agreement.

Mr. Justice Lush, in his judgment, says: "There is not a phrase or a word which implies that the agency is to cease 268] if the *defendant chooses to sell the colliery while it is a working concern. Whether this was an inadvertent omission or an intentional one is beside the question. Probably such an event was not contemplated. It is sufficient, however, to say that it is not provided for, and therefore the contract remains binding as it would have been if the defendant had continued to hold the colliery."

Now, with great respect to the learned judge, how can an intention not in the contemplation of the parties be implied to have existed? There is no doubt that at the time of entering into the agreement both parties contemplated the continuance of the agreement for seven years; that the one would continue to carry on business at Liverpool, and that the other would be the possessor and continue to work the Risca collieries; and upon this expectation they provided for the determining of the contract, in the then existing state of things, by the owner of the colliery if the agents

did not sell, in any year, 50,000 tons of coal, and by the agents in case the owner did not supply 75,000 tons in any one year. This may be called the mode of actively determining the contract.

But what is there in the agreement to prevent its coming positively to a premature end, either by the agents giving up business or the owner giving up the colliery? The mere agreement for seven years, or the provisions for the determination of it on either side, will not be sufficient, and if it had been intended that the relation of the parties should absolutely continue for seven years, it ought to have been provided for, and not being provided for, it cannot in my opinion be taken to have been intended.

It was conceded that the plaintiff in error was not bound to send his coals to Liverpool. By sending them elsewhere he would voluntarily disable the agreement itself; what difference, in point of effect, can there be in him disabling himself from performing it by parting with the colliery?

I agree that the judgment of the Exchequer Chamber should be reversed and judgment entered for the defendant.

LORD HATHERLEY: My Lords, I entirely concur in the views which have been expressed by the noble and learned Lords who have preceded me.

It appears to me, as it did to Mr. Justice Quain in the Court of Exchequer Chamber, that when you peruse [269 this whole agreement you find an ordinary agreement of agency, and of agency alone.

The plaintiffs in the original cause being engaged in business at Liverpool, and the defendant in the original cause being the owner of a colliery, the plaintiffs present themselves to him, and the first stipulation which is contained in the agreement on their part is this—that for the term of seven years they, “or such of them as shall continue to carry on business in the name of the firm at Liverpool, shall and will be the agents of Mr. Rhodes at Liverpool for the sale of the coals of all kinds produced at the Risca Collieries.” In that part of the agreement there is no engagement by Mr. Rhodes—the engagement there is by the Messrs. Paton & Forwood, as persons who are ready to perform the duty of agency at Liverpool. In other words, they say: Here are we for seven years ready and willing to perform the duty of selling your coals produced at the Risca Collieries. That agency might be determined in the manner which has been alluded to, and which is expressed on the face of the agreement, either by the expiration of the

seven years, or by the disappearance from the firm of all the then partners in it.

Then, on the other hand, Messrs. Forwood & Paton having entered into that engagement, Mr. Rhodes says: You having said that you will be always ready and willing to act as my agents for seven years, I will not, for the time that you are so, employ any other agents at Liverpool for the sale of coals coming from the Risca Collieries. He reserves to himself the full right to sell his coals anywhere else, and he also reserves, by the third clause, the sole control over the price of the coals, the mode of effecting sales, and the terms. The sales are to be subject in fact to the approval of Mr. Rhodes in all respects. Messrs. Forwood & Paton are merely agents so long as he retains the sole control over his property in the coal and over the disposition of it. There is no allegation on the part of the plaintiffs of anything in the shape of *mala fides* on the part of Mr. Rhodes in anything that he had done. The ordinary sales were made by him of his property at the times when he thought it beneficial to make such sales. And it is also not now contended that there is anything in this 270] *agreement to prevent Mr. Rhodes from selling his coals elsewhere than in the port of Liverpool, as he may think fit, of course *bona fide*, and not with any special view of evading this agreement. On the other hand, the Messrs. Forwood & Co. engage (and that was greatly relied upon in the Court of Exchequer Chamber) that during the continuance of this agency they will not "act as agents for the sale of any other steam coal without the written consent of Mr. Rhodes to be obtained for each transaction."

Now my Lords, it appears to me that when you have read as far as those four clauses you have a very clear and complete agreement. Afterwards it is true there is the seventh clause, which is very important, upon the whole, in the consideration of the case, regard being had to the arguments which have been adduced on the part of the plaintiffs; still in those four clauses you have a very clear and complete agreement. Messrs. Forwood & Co., on the one hand, say: We are standing here for seven years holding ourselves ready to act as your agents for the sale of your Risca coal, and engaging ourselves during that time to sell the same quality of coal, namely, steam coal, for nobody else; Mr. Rhodes, on the other hand, says: As long as I have Risca coal to sell (that is the effect of it) nobody else but you shall sell it, at Liverpool, but I must have the fixing of the prices, and I must have the full power of selling

it at such other ports as I may think fit. It would be a singular undertaking to introduce by implication into that agreement that he would never during a period of seven years dispose of the colliery itself. Why is there anything more reasonable in implying—on the contrary, is it not much more unreasonable to imply—such a provision as that he would deprive himself for seven years of the power of selling his colliery than that the engagement on the part of Messrs. Forwood & Co. to act as agents was meant to continue only so long as he continued to be the owner of the colliery? The latter seems to me a much more reasonable supposition than the former. The one party says: We are engaging to sell for you, Mr. Rhodes, your Risca coal, of course implying that whilst so acting as your agents we are selling for you in the capacity of the owner of that coal, and when you cease to be the owner of it we shall cease to be agents. The case has arisen in which the agency is necessarily *by the force of events terminated; but [27] to imply such a proposition as this from the agreement, that because other persons have said to you: We are content to act as your agents, and will stand ready and willing for seven years to be your agents; therefore you have engaged not to deal with your own property for that period—seems to me a far more forced interpretation than that of simply inserting a clause like that which I have referred to.

This view of the agreement is very much strengthened by the 7th clause, which shows that they did contemplate possible reasons for the parties being dissatisfied on both sides with the working of the agreement, and wishing to absolve themselves from the binding efficacy of it, that even everything else being the same, they might still wish for other reasons to determine the agreement. For that purpose experience was required to enable them to judge of its working. Accordingly they provide, if you on the one hand find by experience that we are such slow agents that we cannot dispose of 50,000 tons of coals to your advantage, you may determine it; and if we, on the other hand, think that we are such active agents as to be able to dispose of 75,000 tons a year, and you cannot supply us with the quantity then you may determine it.

The parties seem to me to have entered into a simple contract of agency, which necessarily determines when the subject-matter of the agency is gone. The subject-matter of the agency has disappeared without *mala fides* on either side. Therefore the contract is brought to an end by the course of events—by that happening which might neces-

sarily have been expected to happen, and which would have the effect of putting an end to the contract. It was as entirely open to anticipation that the contract of agency might be concluded by that event, as that it might be concluded by the operation of the 7th clause. There are three or four other kinds of contingencies, as the noble and learned Lord on the woolsack has observed, which are unprovided for.

My Lords, it appears to me that all that has happened is this: the parties meet together, and they assume as between themselves the probability of a certain state of things existing, but they do not enter into a guarantee that that state of things shall continue to exist. As was well observed [272] served (if I may say so) by the Lord Chief *Justice in *Stirling v. Maitland* (1), if you find that a certain state of things, which existed at the date of the contract, is necessary in order to give the contract any effect at all, you may no doubt, acting with due care and caution in such cases, imply an agreement that that state of things shall exist, because otherwise no effect could be given to the contract. But here very full effect could, as it appears to me, be given to the contract in the way in which it has been given by the original decision of the Court of Exchequer, and I am of opinion that that decision should stand, and that the judgment of the Court of Exchequer Chamber should be reversed.

LORD PENZANCE: My Lords, I desire to say but a very few words upon this case, agreeing entirely as I do in the way in which this question has been dealt with by the noble and learned Lords who have preceded me. The case resolves itself really into a very simple one, and one which, independently of the special terms of the contract, may be, and probably is, a case that is arising in many other trades and businesses, and in many other individual cases besides the present.

A principal who wants to have a portion of his business transacted in Liverpool, or in any other town, engages an agent, and they enter into a mutual bargain, the one that he will employ no other agent, the other that he will act for no other principal. They enter into other stipulations as to prices, as to commission, and so forth, but the substance of the agreement is such as I have mentioned. Upon such an agreement as that, surely, unless there is some special term in the contract that the principal shall continue to carry on business, it cannot for a moment be implied as a

(1) 5 B. & S., 840, at p. 852.

matter of obligation on his part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it on or not, he shall be bound to carry it on for the benefit of the agent, and the commission that he may receive. I say that in a contract of that kind there ought to be some special obligation, otherwise the natural reading of such a contract would be that, as long as the principal chooses to carry on his business, and *as [273 long as he chooses, as here, to carry on that portion of the business which consists of sales of coals at the particular port, he shall be bound to employ the person with whom he has agreed as his agent for such sales, but that he shall be at liberty, when he likes to put an end to that business, to do so.

But, my Lords, in this case the sort of obligation or condition which is asked by the plaintiff to be implied is of a most singular character, because he does not contend that the principal is bound to carry on the business for his, the agent's, profit. He does not contend that the principal is obliged to continue to send the coal to Liverpool; but he says: Although it is quite true that you are not bound to carry on your business in such a way as to give me any profit whatever, because you are not bound to raise coal, and, if you do, you are not bound to send it to Liverpool, yet I maintain that there is implied somewhere in this contract an obligation that you will keep possession of this colliery. For what purpose? What possible interest has the agent in a condition, that although the principal is not bound to send coal to Liverpool at all, and so put any money into the agent's pocket, still the colliery shall remain the property of the principal? It seems to me, therefore, my Lords, that the contention of the plaintiff in the present case does not go far enough. He ought to have gone at least to the extent of saying: The nature of your bargain was such that I had an interest in it as well as you. You had an interest in selling your coal, I had an interest in obtaining my commission, and you cannot put an end to that business in Liverpool without damaging my interest. But he does not say that; he forbears to say that. He admits that the principal might, in the variety of ways that have been indicated by the noble and learned Lord on the woolsack, have so acted that the agent would have obtained no benefit whatever from the agreement. But he says: I maintain that there is an implied condition that, although I get no benefit out of it, nevertheless you shall keep yourself possessed of the colliery. My Lords, I confess I am quite unable to find

any terms in this contract from which such an obligation can be implied, and I cannot conceive that the intention of the parties was, or that they would have had any interest in its being, that such an obligation should be created.

274] *I wish to say a few words upon the case of *McIntyer v. Belcher* (¹). It was a case in which a medical man bought a business, and was to pay a portion of the profits that he should make from it. After he had bought the business he ceased to carry it on, and, therefore, the seller lost a portion of what was practically the agreed price for which the business was sold. The court held that there was an implied obligation on the part of the defendant that he would go on working at the business in order to make those profits; and I think no one can deny that that was a decision quite in accordance with justice and with law. But that surely was a very different case from the present. There the bargain was for a definite payment out of the profits to be earned by the defendant as part of the price of the thing which had previously been sold to him. Here the bargain is for an agency to be carried on for the mutual benefit of Forwood & Paton, and Rhodes, the selling prices of the coals to be sold being at the sole discretion of Rhodes himself. Therefore, instead of its being a payment for something gone by, the bargain is, that if the business is carried on, Forwood & Paton shall get a certain benefit out of it. It seems to me, therefore, my Lords, that that case not only does not apply in the present instance, but that the principle contained in it very well illustrates the great difference there is between the present case and all cases in which the court has held, in the language which was very aptly quoted by Mr. Manisty from Lord Chief Justice Cockburn (²), "that the defendant is bound to continue a state of things which is necessary to the carrying out of his own contract."

I wish to add one more word upon a suggestion which has been made, that the agents here might be bound for eighteen months not to act for anybody else, notwithstanding that Rhodes had in the meantime sold the colliery. The question, whether they are so bound, does not arise in this case, but I should be sorry to affirm the proposition, that when the defendant had sold the colliery, and had, therefore, practically entirely put an end to the agency, the plaintiffs were still bound not to act for any one else, for I find the terms of the contract upon that subject are these, that Messrs. Forwood & Paton "will not, during the

(¹) 11 C. B. (N.S.), 654; 32 L.J. (C.P.), 254.

(²) *Stirling v. Mailland*, 5 B. & S., 840, at p. 852.

*continuance of their agency, act as agents for the [275 sale of any other steam coal." If the defendant by selling the colliery had put an end to the agency, it might perhaps be very successfully contended that the other party was at liberty to act for other coal proprietors. But that point does not arise in the present case, and, therefore, I desire only to speak negatively, and not to express an affirmative opinion upon it at present.

On the whole, my Lords, I think the judgment of the Court of Exchequer Chamber ought to be reversed, and the judgment of the Court of Exchequer affirmed.

LORD O'HAGAN: My Lords, with such hesitation as is made reasonable by the difference of opinion amongst the learned judges in the courts below, I fully concur in thinking that the decision of the Court of Exchequer Chamber ought to be reversed. The question is merely as to the construction of the contract; and I can add little of value to the argument already presented to your Lordships by the noble and learned Lords who have preceded me.

The terms of the instrument appear to me fairly to indicate the intention of the parties that whatever coals might be sent by the defendant, at his own option, from his mine to Liverpool should be sold there by the plaintiffs, as his agents, for a proper commission; but not at all to import, according to the contention of the respondents, that the appellant should for a period of seven years deprive himself of the power of disposing of his own property,—whatever might be the inducement, the interest, or the necessity. I think that the words in themselves are not naturally and fairly open to this latter construction; and the consequences of such an interpretation seem to me so unreasonable and inconvenient as to incline us to repel it, even if the matter, on the reading of the words, was in a condition of doubt.

As in most cases of the kind, we are little assisted by authority. Judicial decision on one contract can rarely help us to the understanding of another; and, dealing with that before us within itself, regarding the relative position of the parties as throwing light upon its meaning and upon their real purpose; and remembering the admission at the bar that the appellant was at liberty *to sell his coals in [276 other markets besides that of Liverpool, I approve the view adopted by the Court of Exchequer, which is commended, as I have said, by many considerations of consistency and convenience not to be found in that to which it is opposed. I find it hard to believe, that the parties meant to leave the

agents at liberty at any time to escape their responsibility by selling their business (which they might have done under the very words of the contract), whilst the principal was to be bound, under all circumstances, to hold his colliery for seven years in order that these agents might earn their commission. I think the admission of the defendant's right to sell the entire produce of his colliery in other markets, or to cease the working of it, or to put upon his coal prices making it unsaleable, and so to take all profit from the agents in Liverpool, practically involves, also, the admission of his right to dispose of the colliery itself, with precisely the same result of loss and disappointment to the respondents. I think it difficult to hold that the appellant, who had carefully reserved to himself control over his coal by regulating the rates of sale, and the special terms of it, should have debarred himself, for so long a period, from exercising over his property the more important authority of realizing its value, however profitable and desirable the assignment of it might be.

I have said, that there is no case ruling or much affecting the question before us. But I shall refer your Lordships to a passage in the judgment of your Lordships' House in the case of *Shaw v. Lawless* (1), which indicates the hesitation felt by the noble and learned Lords who pronounced it, in assuming, without a very clear expression to that effect, the purpose of a devisor to control the right of a devisee in dealing freely with his own property.

In that case Mr. Shaw, having made a devise for life, and directed the purchase of real estates, declared his desire that his executors should retain Mr. Lawless as agent in the receipt of the rents at the usual fees. The words of the will were held not to create a trust in favor of Mr. Lawless, the Lord Chancellor Cottenham observing, "What is the subject in the present case? It is the right to be employed in the receipt of the rents and the agency and management of [277] the land of the devisee upon the *usual fees. What is the necessary affect of this alleged right? It goes to exclude Shaw from the management of his own estate or from the receipt of the rents themselves!" And in a previous part of his judgment he says, "When your Lordships see to what extent, and I might almost say to what absurd extent, this construction of the will necessarily leads, you cannot hesitate in coming to the conclusion that it is at least very doubtful how far this could possibly have been the intention of the testator." And so, in this case, I more than

(1) 5 Cl. & F., 129, at p. 155.

hesitate to believe that the intention imputed to the parties by the respondents could really have been entertained by them.

Looking to these considerations, and the plain words of the instrument itself, I believe the conclusion to which your Lordships have arrived is well justified, and will carry into effect the true purpose of the contract.

Judgment of the Court of Exchequer Chamber reversed; and judgment of the Court of Exchequer affirmed.

Lords' Journals, 4th May, 1876.

Solicitors for appellants: *Bridges, Sawtell, Heywood & Ram.*

Solicitors for respondent: *Chester, Urquhart, Mayhew & Holden.*

[Law Reports, 1 Appeal Cases, 278.]

H.L. (Sc.), July 30, 1875.

[HOUSE OF LORDS.]

(Before the Lords' Committee for Privileges.)

*BELHAVEN AND STENTON PEERAGE.

[278]

CLAIM OF JAMES HAMILTON OF STEVENSTON.

CLAIM OF LIEUT.-COL. HAMILTON OF THE GRENADIER GUARDS.

Circumstantial Evidence.

Remarks of the LORD CHANCELLOR ⁽¹⁾ showing that in considering circumstantial evidence *all* the circumstances must be examined and compared to establish the required elucidation.

Help afforded by opposing Criticism.

In dealing with circumstantial evidence, the court derives much aid from the opposing criticisms of counsel.

THE Scottish peerage of Belhaven and Stenton was created in 1647 by Charles I., with descent to heirs male. The eighth baron was Robert Montgomery Hamilton, who dying in 1868 without issue, the question of succession arose between the above contending claimants, whose petitions to the Crown were referred by Her Majesty to the House of Peers, and by the House to their Lordships' Committee for Privileges.

Mr. *Charles Scott*, Mr. *Rolland*, Mr. *Laurie*, and Mr. *McAlpin*, appeared as counsel for the claimant James Hamilton of Stevenston.

(¹) Lord Cairns.

Mr. *Fleming*, Q.C., and Mr. *John Pearson*, Q.C., for the claimant Lieutenant-Colonel Hamilton; and

The *Lord Advocate* (¹) and Mr. *Badenoch Nicolson*, for the Crown.

At the close of the examination of witnesses, and of the argument by counsel, the Lord Chancellor (²) remarked that the case turned entirely on circumstantial evidence as to the pedigree of the above competitors.

279] *With reference to circumstantial evidence in general, his Lordship made the following observations:

THE LORD CHANCELLOR: My Lords, in dealing with circumstantial evidence, we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand, you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and, when united, producing a body of illumination which will clear away the darkness which you are endeavoring to dispel.

I feel peculiar satisfaction in thinking that your Lordships have not here to decide merely upon the case of one claimant; you have not to decide simply upon the case of James Hamilton claiming to be the heir by the elder line, but you have the very great advantage of a skilful contradictor and antagonist, who is able with the best advice to bring to bear an amount of wholesome criticism which must always be applied to a question of circumstantial evidence before any satisfactory conclusion can be arrived at.

After thus expressing himself, his Lordship next proceeded to examine with much care and with great elaboration the evidence in the case adduced by the respective claimants, with the arguments of the learned counsel on both sides—arriving, as his Lordship did, at the conclusion, that James Hamilton of Stevenston had established his claim to the peerage of Belhaven and Stenton.

LORD HATHERLEY concurred with this opinion, holding that the case depended entirely upon circumstantial evidence, some of which was obscure and complicated, and ranging over a century and a half of family history.

THE CHAIRMAN (³) and the other members of the Committee for Privileges came to the resolution that “the claimant James Hamilton of Stevenston had made out his claim 280] to the title, honor, *and dignity of Lord Belhaven and Stenton in the peerage of Scotland.” This report from the

(¹) Mr. Gordon, Q.C.

(²) Lord Cairns.

(³) Lord Redesdale.

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Committee was agreed to by the House, and an order was made that the resolution should be laid before Her Majesty by the Lords with White Staves, and transmitted to the Lord Clerk Registrar of Scotland—and it was further ordered that the Lord Belhaven and Stenton should take his proper place at the future meetings of the peers of Scotland.

Agent for the Crown: *Hugh Hope*.

Agent for the successful claimant: *Andrew Gillman*.

Agents for Lieutenant-Colonel Hamilton: *Grahames & Wardlaw*.

C A S E S

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE QUEEN'S BENCH DIVISION,

AND BY THE

COURT FOR CROWN CASES RESERVED,

XXXIX VICTORIA.

[Law Reports, 1 Queen's Bench Division, 4.]

Nov. 20, 1875.

4] *WALKER, Appellant; HORNER, Respondent.

Highway—"Wilful Obstruction"—*Highway Act, 1835* (5 & 6 Wm. 4, c. 50), s. 72—
Allowing Trees to grow so as to obstruct Footway.

By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 72, if any person shall "wilfully obstruct the passage of any footway," he is made liable to a penalty of 40s. The respondent was summoned under s. 72, for obstructing a way. Evidence was given that trees and underwood on his land had grown over and across the way, so as to be an obstruction to the free passage along it:

Held, by Mellor and Quain, JJ. (Cockburn, C.J., dissenting), that the respondent, in merely suffering the trees to grow so as to be an obstruction, did not "wilfully obstruct" the way within s. 72.

CASE stated by justices of Surrey under 20 & 21 Vict. c. 43. The respondent was summoned under s. 72 of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), at the instance of the Godstone highway board, for wilfully obstructing the free passage of a highway—to wit, a bridle way.

During the last year or two the surveyor of the highway board on several occasions complained to the respondent of the obstruction hereinafter mentioned, and called upon him

to lop or cut the trees, but he refused to do so, alleging that he did not admit the way to be a public one, and on the 20th of February, 1875, the clerk of the highway board sent him a letter, requesting him to remove the obstruction in the Nobright bridle way, which ran through his property in the parish of Godstone, by lopping the trees and underwood, in order that the same might be rendered passable for persons riding along it, and the present inconvenience to foot passengers thereby removed, and stating that, in the event of his not complying with the above request within ten days from the date, the highway board would be compelled to take such proceedings in the matter as they might be advised.

The respondent replied by letter that, as he did not acknowledge the existence of the bridle way alluded to, he was unable to comply with the request of the highway board.

The summons was thereupon issued, and came on for hearing.

By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 72, "If any person shall wilfully ride upon any footpath or causeway, by the side of any road made or set apart for the use or accommodation *of foot passengers, or shall wilfully [5] lead or drive any horse, ass, sheep, mule, swine, or cattle, or carriage of any description, or any truck, or sledge upon any such footpath or causeway, or shall tether any horse, ass, mule, swine, or cattle on any highway, so as to suffer or permit the tethered animal to be thereon, or shall cause any injury or damage to be done to the said highway, or the hedges, posts, rails, walls, or fences thereof, or shall *wilfully obstruct the passage of any footway*, or wilfully destroy or injure the surface of any highway, or shall wilfully or wantonly pull up, cut down, remove, or damage the posts, blocks, or stones fixed by the surveyor, as herein directed, or dig, or cut down the banks which are the securities and defence of the highways; or break, damage, or throw down the stones, bricks, or wood fixed upon the parapets, or battlements of bridges, or otherwise injure or deface the same, or pull down, destroy, obliterate, or deface any milestone or post, graduated or directed post or stone erected upon any highway, or shall play at football or any other game on any part of the said highways, to the annoyance of any passenger or passengers, or if any hawker, higgler, gipseey, or other person travelling, shall pitch any tent, booth, stall, or stand, or encamp upon any part of any highway, or if any person shall make, or assist in making any fire, or shall wantonly fire off any gun or pistol, or shall set fire to or

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wantonly let off or throw any squib, rocket, serpent, or other firework whatever within fifty feet of the centre of such carriage-way, or cartway, &c., . . . or shall in any way wilfully obstruct the free passage of any such highway, every person so offending shall forfeit and pay any sum not exceeding 40s. over and above the damage occasioned thereby."

By s. 65, if the surveyor (of highways) shall think that any carriage-way or cartway is prejudiced by the shade of any hedges, or by any trees (except those trees planted for ornament or for shelter to any hop-ground, house, building, or courtyard of the owner thereof) growing in or near such hedges, or other fences, and that the sun and wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriage-way or cartway by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land on which such hedges or trees are 6] *growing next adjoining to such carriage-way or cartway, to appear before the justices at a special sessions for the highways, to show cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped in such manner that the carriage-way or cartway shall not be prejudiced, &c., or why the obstruction caused in such carriage-way or cartway shall not be removed. . . .

By s. 66, no person shall be compelled, nor any surveyor permitted, to cut or prune any hedge at any other time than between the last day of September and the last day of March; and no person shall be obliged to fell any timber trees growing in hedges at any time, except where the highways shall be ordered to be widened or enlarged as herein mentioned,

At the hearing evidence was given to the effect following:

That respondent, in or about the year 1869, purchased a freehold estate formerly called the Nobright, over which estate and adjoining lands the way in question passes.

That in one part of its course the way passes through a wood belonging to the respondent and in his occupation. That the trees and underwood growing on the land of the respondent and in his occupation on each side of the way in question, had of late years so grown over and across the way in places as to be an obstruction to the free passage along the same, and in one place the boughs met so as to render it almost impossible for persons on horseback to pass along it.

The respondent, while not admitting either the right of

way or the obstruction as matters of fact, objected at the adjourned hearing, that if the way was a public bridle way and an obstruction thereto had been caused in the manner alleged by the appellant, such obstruction was not a wilful obstruction within the meaning of sect. 72 of the Highway Act, 1835, and that the remedy of the appellant, if the way was a public bridle way and the passage of it was obstructed in the manner alleged, was by indictment or action, or, at all events, not by summary proceedings under the 72d section of the Highway Act, 1835; and the justices, being of opinion that even if the way were a public bridle way, an obstruction caused by suffering the trees and underwood to grow up or across a public bridle way as alleged was not a wilful obstruction within the meaning of sect. 72, dismissed the complaint.

The question for the opinion of the court was, whether the decision of the justices was right in dismissing the complaint on the ground above stated.

Lumley Smith, for the appellant: The way in question being neither a carriage nor a cartway, it was impossible to proceed under s. 65 for the purpose of compelling the respondent to prune or lop the trees. The only question is whether his neglect to prune the trees is a wilful obstruction within s. 72. If he planted trees directly upon the highway, this would be an obstruction, and it can make no difference if he plants trees which must necessarily grow over it. In Chitty's Criminal Law, vol. 3, p. 617, there is a precedent of an indictment for continuing a hedge so as to obstruct a pack and prime way; and it is laid down in Hawkins's Pleas of the Crown, vol. 1, pp. 700, 701, that making a hedge athwart a highway is a public nuisance, also that it is a nuisance to suffer the boughs of trees growing near the highway to hang over the road in such a manner as thereby to incommode the passage. *Williams v. Adams* (*) shows that under s. 73 the justices have jurisdiction to try whether the *locus in quo* is a highway or only an occupation road. The respondent will probably rely on the case of *Croasdill v. Ratcliffe* (*), where the occupier of a stable from which rain water dropped so as to injure a footway by flowing upon and over it, was held not liable to be convicted under s. 72; but the decision only amounted to this, that he was not guilty of "suffering filth, &c., to flow upon the highway" within the meaning of the latter part of the section.

Bulwer, Q.C. (*Athawes* with him), for the respondent:

(*) 2 B. & S., 312; 31 L. J. (M.C.), 109.

(*) 5 L. T. (N.S.), 834.

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By s. 5 of the act the word "highways" is to include "bridle ways," and the fact that s. 65 subsequently makes provision for the case of carriage ways being obstructed by trees, and that s. 66 only permits the surveyor to remove the obstruction during a particular season of the year, goes to show that the case of a bridle way so obstructed was designedly left untouched by the Legislature. With regard to the authorities cited by the appellant, the question is 8] *not whether an obstruction by allowing boughs of trees to grow over the highway is indictable, but whether it is the subject of the summary procedure. Sect. 72 makes an elaborate enumeration of different offences, but does not specify this, which in the case of a carriage-way is specifically provided for. The case of *Croasdill v. Radcliffe* (') is undistinguishable. It proceeded upon the ground that there was no "wilful obstruction" within s. 72.

Lumley Smith, in reply.

COCKBURN, C.J.: In this case I cannot say that my mind is free from doubt, more especially as my opinion is different from that of my learned Brothers. My own impression is that the case is within s. 72, having regard to the authorities, which establish that if a man allows trees to grow so as to obstruct a highway he is guilty of an indictable offence. Now it is clear that no indictment will lie unless there has been in the eye of the law a wilful obstruction. This is always a necessary ingredient in determining the liability of the person indicted, and I think that the section ought to be construed according to the existing law, and so as to include the case in question. My learned Brothers being of a contrary opinion, there will be judgment for the respondent.

MELLOR, J.: I think that our judgment ought to be for the respondent. The class of offences enumerated in s. 72, such as pitching tents or booths upon the highway, firing guns or pistols, or throwing squibs near the centre of a carriage-way, or laying lumber or rubbish upon any highway, seems to show that the section was intended to apply to persons who actively cause an obstruction. I cannot think it was intended to apply to all indictable obstructions, but it seems to me that it is confined to obstructions of the character specified in the section. The fact that in the case of carriage ways obstructed by trees a summary remedy is given strengthens this construction, especially as by s. 66 this summary remedy is restricted to certain seasons of the year. I do not think that we ought to enlarge the words

(') 5 L. T. (N.S.), 834.

of the section by saying that other offences which are not specified are within them.

*QUAIN, J.: I am of the same opinion. We must look [9 at the class of offences in which, by s. 72, it was intended to give a summary jurisdiction. These offences are, amongst others, "wilfully destroying the surface of any highway, breaking, damaging, or throwing down the parapets of bridges," &c. I think that merely suffering trees to grow over the highway is not a wilful obstruction of the same class as these offences.

Judgment for the respondent.

Solicitor for appellant: *W. A. Head, Jun., for W. A. Head & Sons, East Grinstead.*

Solicitor for respondent: *T. N. Crosse.*

[Law Reports, 1 Queen's Bench Division, 15.]

Nov. 13, 1875.

[CROWN CASE RESERVED.]

*THE QUEEN V. SAUNDERS and HITCHCOCK. [15

Nuisance—Indecency—Booth for Indecent Exhibition—Public Place—Indecent Language.

The prisoners were indicted in one count for keeping a booth for the purpose of showing an indecent exhibition; in a second for showing for gain an indecent exhibition in a booth; in a third for showing an indecent exhibition in a public place. It was proved that during the Epsom races the prisoners, who were travelling showmen, kept a booth on Epsom Downs for the purpose of an indecent exhibition, that they invited people to enter, and that those who would pay entered and saw an indecent exhibition:

Held, that the prisoners had committed an indictable offence, and that it was well laid in the indictment.

CASE stated by the chairman of the Surrey quarter sessions.

At the general quarter session of the peace, holden at St. Mary, Newington, in and for the county of Surrey, on Tuesday, the 29th of June, 1875, John Saunders and George Hitchcock were tried on an indictment of which, so far as it is material, the following is a copy:

"Surrey, to wit. The jurors for our Lady the Queen, upon their oath present that John Saunders and George Hitchcock, being scandalous and evil disposed persons, and devising, contriving and intending the morals as well of youth as of divers other liege subjects of our said Lady the Queen, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on the 23d day of May, in the year of our Lord, 1875, at the parish of Epsom, in the county of Surrey, unlawfully, wickedly and

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scandalously did keep and maintain a certain booth, tent and shed for the purpose of exhibiting and showing to the sight and view of any person or persons willing and desirous of seeing the same, and paying for their admission into the said booth, tent and shed, divers lewd, wicked, scandalous, infamous, bawdy and obscene performances, representations, practices and figures, and in the said booth, tent and shed, on the said 23d day of May in the year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, [16] wickedly and scandalously, for lucre and gain, did *exhibit and show the said performances, practices, representations and figures, and cause and permit the same to be exhibited and shown to the sight and view of divers and very many liege subjects of our said Lady the Queen, to the manifest corruption of the morals as well of youth as of other liege subjects of our said Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

“Second count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Saunders and George Hitchcock, being scandalous and evil disposed persons, and devising, contriving and intending the morals as well of youth as of divers other liege subjects of our Lady the Queen, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on the said 23d day of May in the year aforesaid, at the parish aforesaid, in the county aforesaid, in a certain booth, tent and shed there situate, did unlawfully, wickedly and scandalously exhibit, show and cause to be exhibited and shown, for lucre and gain, to and in the view of divers and very many liege subjects of our Lady the Queen, divers lewd, wicked, scandalous, bawdy and obscene performances, representations, practices and figures, to the manifest corruption of the morals as well of youth as of other liege subjects of our Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

“Third count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Saunders and George Hitchcock, being scandalous and evil disposed persons, and devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said Lady the Queen, to debauch and corrupt, and to raise and create in their minds inordinate and lustful de-

sires, on the 23d day of May in the year of our Lord, 1875, in a certain public place, to wit, Epsom Downs, situate in the parish of Epsom aforesaid, in the county of Surrey aforesaid, unlawfully, wickedly and scandalously did exhibit and show, and cause and permit to be exhibited and shown, for lucre *and gain, to the sight and view of [17 divers liege subjects of our Lady the Queen, in the said public place as aforesaid, there being divers indecent, lewd, filthy, bawdy, and obscene representations, practices and performances, to wit [describing the exhibition], to the manifest corruption of the morals as well of youth as of other liege subjects of our said Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

"Fourth count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Saunders and George Hitchcock, being wicked and evil disposed persons, and devising, contriving and intending the morals as well of youths as of divers other liege subjects of our said Lady the Queen, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on the 23d day of May, in the year of our Lord, 1875, in the presence and hearing of divers liege subjects of our said Lady the Queen, there assembled together, to wit, on Epsom Downs, in the Parish of Epsom, in the county of Surrey, unlawfully, wickedly and scandalously did publish, utter, pronounce and declare, and cause and procure to be published, uttered, pronounced and declared the wicked, obscene, filthy and bawdy words and matter following [setting out certain obscene language], to the manifest corruption of the morals as well of youth as of other liege subjects of our said Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, and against the peace of our said Lady the Queen, her Crown and dignity."

Fifth, sixth, and seventh counts, similar to the first, second and third, but relating to a subsequent occasion, namely, the 26th of May.

It appeared from the evidence that the prisoners were travelling showmen, pursuing their calling on the Epsom Downs on the 23d and 26th of May, 1875, during the Epsom summer races, and were the owners and keepers of a booth. On the 23d and on the 26th of May the prisoners invited various persons to enter their booth, and all who would pay the price charged were admitted. Inside the

booth a grossly indecent exhibition took place. It was further proved that on the 23d the prisoner Saunders used [18] the *indecent language alleged in the 4th count, and on that day and the 26th both prisoners used other indecent language to induce people to go into the booth.

Counsel on behalf of the prisoners objected that they could not be legally convicted:

1st. Upon the 1st, 2d, 4th, 5th and 6th counts of the above indictment, on the ground that those counts do not disclose an indictable offence at common law.

2d. Upon the 3d and 7th counts of the above indictment, on the ground that there was no evidence of an indictable offence at common law by indecency in a public place, the said "booth, tent and shed" not being a public place as alleged in those counts.

The chairman overruled the objections taken to the above counts, and both the prisoners were convicted on these counts, but judgment was respited for the purpose of taking the opinion of the court on these objections. If the court should be of opinion that these objections were valid, the conviction was to be quashed; if not, the conviction was to be affirmed.

Edward Clarke (*Lyall* with him) for the prisoners: The 1st and 2d, and the 5th and 6th counts of the indictment are bad, because they do not allege any indecency to have been committed in a public place. And the 3d and 7th counts, which do allege indecency in a public place, were not proved. A booth kept by the prisoners, which the public have no right to enter, and into which no one is admitted except on payment, is not a public place within the meaning of the rule. The fourth count is not good. The mere utterance of indecent language is not a criminal offence.

[He cited *Reg. v. Webb* ('); *Reg. v. Watson* ('); *Reg. v. Thalman* ('); *Reg. v. Holmes* (').]

Baggallay, for the prosecution, cited 2 Chitty's Crim. Law, p. 48; 2 Strange, p. 789.

The judgment of the court (Lord Coleridge, C.J., Bramwell and Pollock, BB., Mellor and Grove, JJ.) was delivered by

LORD COLERIDGE, C.J.: It appears to have been proved [19] that *the two prisoners kept on Epsom Downs a booth

(1) 1 Den. Cr. C., 338; 18 L.J. (M.C.), 89.

(2) 2 Cox, Cr. C., 376.

(3) Leigh & Cave, Cr. C., 326; 33 L.J. (M.C.), 58.

(4) Dears. Cr. C., 207; 22 L.J. (M.C.), 122.

for the purpose of showing an indecent exhibition; that they invited all persons who came within reach of their solicitations to come in and see it; and that those who paid went in and did see what was grossly indecent. We think that those facts are abundant to prove a common law offence; and that it is well stated in the indictment. On this ground the conviction must be affirmed.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*

Solicitor for prisoners: *W. H. Fullager.*

[Law Reports, 1 Queen's Bench Division, 19.]

Nov. 13, 1875.

[CROWN CASE RESERVED.]

THE QUEEN V. COOPER.

Evidence—False Pretences—Advertisement inviting Answers by Letter—Letters at Post Office addressed to Prisoner, but not delivered.

The prisoner was indicted in four counts for obtaining money by false pretences from four persons named, the false statements alleged being the same in all these counts; in a fifth count for inserting, with intent to defraud the Queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts and obtaining money thereby. It was shown at the trial that the prisoner had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of carte-de-visite papers, and adding, "Trial paper and instructions, 1s.," and giving an address. Six envelopes were found in the possession of the prisoner on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage-stamps. Two hundred and eighty-one other letters were produced by a post office clerk. These letters had been addressed, to the prisoner under the address given in the advertisement, and had been received at the post office like the other letters; but, having been stopped by the post office authorities, none of them had ever been in the prisoner's possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post office before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted in evidence:

Held, that, under the circumstances, the letters were rightly received in evidence.

CASE stated by the chairman of the Northampton court of quarter sessions.

The prisoner, George Cooper, was tried on an indictment *for obtaining and attempting to obtain certain moneys [20 from the persons in the indictment mentioned, by false pretences.

The following is an abstract of the indictment:

First count. Falsely pretending to Maria Mitchell that certain persons called Davis Brothers were carrying on business at Hardingstone, and were acquainted with a

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method whereby 2s. 6d. per hour could be earned by beginners of either sex, by preparing carte-de-visite papers at their own homes at 8d. per dozen, and were able to give permanent employment to all who should learn the method by their instruction, whereby the defendant obtained twelve stamps.

Second count. Similar false pretences to John Clarke, whereby the defendant obtained certain stamps.

Third count. Similar false pretences to Ellen Cameron, whereby the defendant attempted to obtain one shilling.

Fourth count. Similar false pretences to Elizabeth Hickson, whereby the defendant attempted to obtain one shilling.

Fifth count. That the defendant, with intent to defraud the Queen's subjects, inserted in the Daily Telegraph a fraudulent advertisement, in the words therein mentioned, containing the false statements in the first count mentioned, whereby he obtained sums of money and stamps from the Queen's subjects.

The advertisement was as follows: "Two and sixpence per hour easily earned by beginners (either sex) by preparing carte-de-visite papers, at their own homes, at 8d. per dozen. Employment permanent. Trial paper and instructions, 1s. Davis Brothers, Hardingstone, Northampton."

On the trial it was proved that the prisoner inserted the said advertisement; that there was no such firm as Davis Brothers at Hardingstone; and that the prisoner was not in a position to give permanent employment.

Six envelopes, each directed as above, containing answer to the advertisement and twelve postage-stamps, were found in the possession of the prisoner on his being apprehended; 281 other letters were produced by the chief clerk of the post office at Northampton in a sealed bag.

These letters had also been addressed to the prisoner under the title of Davis Brothers, Hardingstone, in reply to 21] the said *advertisement, and had been received at the office in like manner as those mentioned in the former paragraph, but having been stopped by the post office authorities before the said letters had been delivered, none of the 281 letters had ever been in the prisoner's possession or custody, nor was any proof adduced that they were written by the persons from whom they purported to come, but each letter had been opened at the post office before production at the trial, and each contained twelve stamps.

The counsel for the prosecution proposed to put the whole of such letters in evidence against the prisoner.

The counsel for the prisoner objected that, the said letters not having been found in the possession of the prisoner, and as their contents were unknown to him, and there was no proof of their authenticity, they could not be adduced in evidence against the said prisoner.

The court admitted the said letters, two were read, and all the others taken as read. It was proved that when they were opened by the post office clerk each envelope contained twelve postage-stamps, as when admitted in evidence. The letters, except the said two, were not, in fact, read, but were taken as having been regularly put in, and were commented upon by the counsel for the prosecution.

The jury found the prisoner guilty, and the court sentenced him to nine months' imprisonment with hard labor, but reserved for the consideration of the justices of either bench and barons of the exchequer the question whether the court ought to have admitted the said letters as evidence against the prisoner.

If the court should be of opinion that the court of quarter sessions ought to have rejected the said letters as evidence, then the conviction to be quashed; if not, to be affirmed.

Jacques, for the prisoner: The letters were not admissible in evidence, inasmuch as they never reached the hands or were in the possession of the prisoner: *Rex v. Hevey* (').

[POLLOCK, B.: In that case the prisoner had done nothing to invite the letters to be sent.]

There is no evidence of the sending or identity of these letters; *the senders ought to have been called: [22 *Rex v. Plumer* ('); *Rex v. Huet* ('). If these letters are admissible, the prosecution might always manufacture evidence against a prisoner after he was in custody.

[LORD COLERIDGE, C.J.: It has often been held that when a letter is put in course of transmission, the postmaster-general holds it as the agent of the receiver. He referred to *Reg. v. Jones* ('); *Reg. v. Buttery* (').]

Merewether, contra. If the prisoner had been indicted in respect of any specific one of the letters in question, no doubt the sender ought to have been called; but here it was otherwise. Even apart from the authorities, which show generally that the postmaster-general is the agent of the person to receive a letter, here the terms of the advertisement expressly make him so: *Reg. v. Welman* ('). The

(¹) 1 Lea. Cr. C., 232.

(²) Russ. & Ry., 264.

(³) 2 Lea. Cr. C., 820.

(⁴) 1 Den. Cr. C., 551; 19 L. J. (M.C.), 162.

(⁵) Cited 4 B. & Ald., at p. 179.

(⁶) Dears. Cr. C., 188; 22 L. J. (M.C.), 118.

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letters are admissible under the first four counts to show fraudulent intent: *Reg. v. Francis* (¹).

[BRAMWELL, B.: That case would be the same as this if in this case there had been several advertisements. But how can what happens after the advertisement be evidence of the prisoner's intention in inserting it?]

At any rate the letters must be admissible under the last count. Under that count he might have been convicted of an attempt, and for that they are clearly material.

Jacques replied.

LORD COLERIDGE, C.J.: The majority of the court (Lord Coleridge, C.J., Bramwell and Pollock, BB., Mellor and Grove, JJ.) are of opinion that under the circumstances the letters were admissible in evidence.

Conviction affirmed.

Solicitor for prosecution: *A. J. Jeffrey, Northampton.*

(¹) Law Rep., 2 C. C., 128.

As to when letters received and those never received by the prisoner are admissible against him and when not, see 2 Eng. Rep., 195 note; *Id.*, 233 note.

In *Gates v. People* (14 Illinois, 433, 2 Am. Law Reg., O.S., 671), the prisoner was in jail charged with an offence but not with the murder of one Daniel Liley. One John Devol was sent by the sheriff to have an interview with the prisoner, and learn what he could about the murder of Liley. Devol assured the prisoner that he was charged with murdering Liley and that officers were then in pursuit of him. Devol told the prisoner he was willing to assist him and would do whatever he desired. The prisoner then requested the witness to go to his brother, John Gates, and tell him to "write that letter," and directed the witness to take the letter to Chicago and put it in the post office. The witness delivered the message, and John Gates immediately wrote the letter; the witness handed the letter to the sheriff and it was read in evidence on the trial. It purported to be written at Chicago by Liley, and was addressed to Hilton, with whom Liley resided prior to his death. It stated that Liley would be absent for some months. All this evidence was objected to as inadmissible. The court held it proper. After citing with approval the case of *Rex v. Derrington*, 2 Carr. & Payne, 418, it said: "In this case if the prisoner had made confessions to the witness, they would have

been receivable in evidence. The witness made neither promises nor threats to induce him to confess. He simply offered to render the prisoner such assistance as he might desire. But no confessions were in fact made. The prisoner was not inclined to make a confidant of the witness. He would only trust him to carry an ambiguous message to his confederate in guilt, and then to convey a letter from that confederate to the post office. The fact that he was deceived by the witness, did not render the evidence inadmissible. If the witness had deposited the letter in the post office it would have been competent evidence against the prisoner, in connection with proof that it was written at his instance. The letter and the attendant circumstances were properly admitted."

A confession will be received in evidence, even though induced by deception, if the inducement be not such as to lead to an untrue confession, and the preliminary evidence establishes the fact that the confession was made by the prisoner voluntarily: *Com. v. Hanlon*, 3 Brewster (Pa.), 462, S.C., 8 Phil. Rep., 423, 426; 2 Bennett & Heard's Lead. Crim. Cases (2d ed.), 595; *State v. Jones*, 54 Missouri, 478; *People v. Jeffers*, 5 Park., 522.

So a confession to a detective, who enters into communication with criminals without any felonious intent but for the purpose of discovering and

making known their secret designs and crimes : *State v. McKean*, 86 Iowa, 343.

So, though defendant be under the influence of liquor by the procurement of a detective : *Com. v. Howe*, 9 Gray, 110 ; *Rex v. Spilsbury*, 7 Carr. & Payne, 187, 32 Eng. Com. Law Rep. ; *People v.*

Jefferds, 5 Park., 522 ; *Eskridge v. State*, 25 Ala., 80.

Though not, if so much so that he did not understand what he said or did : *Com. v. Howe*, 9 Gray, 110 ; *Eskridge v. State*, 25 Ala., 83-4.

[Law Reports, 1 Queen's Bench Division, 23.]

Nov. 13, 1875.

[CROWN CASE RESERVED.]

*THE QUEEN v. WELCH.

[23

Malicious Injury—Cattle—Malice—Reckless Disregard as to whether act might injure—
24 & 25 Vict. c. 97, s. 40.

On an indictment under 24 & 25 Vict. c. 97, s. 40, for unlawfully and maliciously killing, maiming, and wounding a mare, it was proved that the prisoner caused the death of the mare through injuries inflicted by his inserting the handle of a fork into her vagina, and pushing it into her body. There was no evidence that the prisoner was actuated by ill-will towards the owner of the mare, or spite towards the mare, or by any motive except the gratification of his own depraved taste. The jury found that the prisoner did not, in fact, intend to kill, maim, or wound the mare ; but that he knew what he was doing would or might kill, maim, or wound the mare, and nevertheless did what he did recklessly and not caring whether the mare was injured or not. The jury convicted the prisoner :

Held, that there was sufficient malice, and that the conviction was right.

CASE stated by Lindley, J.

The prisoner was indicted under 24 & 25 Vict. c. 97, s. 40 ('), for unlawfully and maliciously killing, maiming, or wounding a mare. The indictment contained three counts, viz. : 1, for killing ; 2, for maiming ; 3, for wounding.

The prisoner was tried at the Old Bailey on the 23d of September, 1875.

The evidence showed that the mare in question died by reason of injuries caused by the prisoner. These injuries consisted of a hole in the base of the bladder, and three holes in the large intestines. They were caused by the prisoner inserting the handle of a stable fork into the vagina of the mare and pushing the handle two feet and more into the mare's body and working the fork backwards and forwards in that position. Whilst this was being done the mare put her ears back and stamped her feet, and it was proved that these were signs of pain.

There was no evidence to show that the prisoner was actuated by any ill-will towards the owner of the mare, nor by any spite towards the mare herself, nor, in fact, by any

(¹) By 24 & 25 Vict. c. 97, s. 40, "who kill, maim, or wound any cattle shall be soever shall unlawfully and maliciously guilty of felony. . . ."

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motive or desire except the gratification of his own depraved tastes.

24] *It was objected by counsel for the prisoner that there was no case for the jury as there was no malice. The learned judge overruled the objection, and having *Reg. v. Pembliton* ⁽¹⁾ before him, directed the jury to find the prisoner guilty if they were of opinion that either of the two following questions ought to be answered in the affirmative, viz.:

1. Did the prisoner, in fact, intend to kill, maim, or wound the mare? or if he did not, then—

2. Did he know that what he was doing would or might kill, maim, or wound the mare, and did he nevertheless do what he did recklessly and not caring whether the mare was injured or not?

The jury answered the first question in the negative, and the second in the affirmative, and the prisoner was found guilty accordingly.

The question for the court was whether the conviction ought to be quashed or not.

No counsel appeared for the prisoner.

Besley, for the prosecution, was stopped by the court.

The judgment of the court (Lord Coleridge, C.J., Bramwell and Pollock, BB., Mellor and Grove, JJ.) was delivered by

LORD COLERIDGE, C.J.: We are all of opinion that there was malice sufficient to sustain this conviction.

Conviction affirmed.

Solicitor for prosecution: *A. Leslie.*

(¹) Law Rep., 2 C. C., 119.

See 1 Eng. Rep., 408 note; 4 id., 223 note; 12 Eng. Rep., 234 note; *Reg. v. Prince*, 13 Eng. Rep., 385.

To constitute the statutory offence of disturbing religious worship the act must be wilfully or intentionally done; it is not sufficient that it was done recklessly or carelessly: *Harrison v. State*, 37 Ala., 154, *Shep. Sel. Cas.* 61; *Com. v. Wentworth*, 118 Mass., 441.

"Wilfully" sometimes means little more than "intentionally;" but in penal statutes and criminal law it usually conveys the further idea that the act was done wrongfully, in bad faith, with evil intent or legal malice, or without reasonable ground for believing it lawful: *State v. Preston*, 34 Wisc., 675; *Stern v. State*, 53 Geo., 229; *Field v. State*, 50 Ind., 15; *People v.*

Powell, 63 N. Y. Rep., 91-2; *McCourt v. People*, 64 N. Y., 583; *State v. Holway*, 41 Iowa, 202.

Malice is used, in law, in a technical sense, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malò animo*, when the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief: *Com. v. Webster*, 5 Cush., 295; *Coghill v. State*, 37 Ind., 114.

When an act is intentionally done it is "maliciously" done: *Gardner v. Peo-*

ple, 62 N. Y., 299; Sullivan County v. Grafton Co., 55 N. H., 339; State v. Gould, 40 Iowa, 872; State v. Welch, 21 Minn., 22; State v. Goodenow, 65 Maine, 80; State v. Smith, 65 Maine, 257.

When the intent is the gist of the offence it must be proved as laid in the

indictment. An indictment for an assault with an intent to commit murder will not sustain a conviction for an assault with intent to commit manslaughter, although defendant might thereunder be convicted of an assault: State v. White, 41 Iowa, 816, citing many cases.

[Law Reports, 1 Queen's Bench Division, 25.]

Nov. 18, 1875.

[CROWN CASE RESERVED.]

*THE QUEEN V. ROBERT DOWNES.

[25

Manslaughter—Infant Child—Neglect to provide Medical Aid—Bona fide Belief that Medical Aid unnecessary and wrong—81 & 82 Vict. c. 122, s. 37.

By 81 & 82 Vict. c. 122, s. 37, "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been, or shall be likely to be, seriously injured, he shall be guilty of an offence punishable on summary conviction."

Upon the trial of an indictment for manslaughter it was proved that the prisoner was the father and had the custody of an infant child. The child was ill and wasting for eight or nine months from chronic inflammation of the lungs and pleura, and then died. The prisoner belonged to a sect who never call in medical advice, but call in the elders of their church to pray over the sick person. This course was pursued with the prisoner's child. The prisoner, however, who had no medical skill himself, consulted the person called in to pray over the child, who also had no medical skill, and they thought the child was suffering from teething, and gave it articles of diet which they thought suitable for a child so suffering. The prisoner had sufficient means to procure skilled advice, which was easily obtainable. The jury found on evidence, which, it was to be taken, was sufficient to warrant their findings: first, that the prisoner neglected to procure medical aid for the child when it was in fact reasonable so to do, and when he had the ability; secondly, that the death was caused by that neglect; thirdly, that he *bona fide*, though erroneously, believed that medical aid was not required for the child; fourthly, that he *bona fide* believed that it was wrong to call in medical aid. The learned judge thereupon directed a verdict of guilty to be entered:

Held, without expressing any opinion as to how the case would have stood at common law apart from the above statute, that that statute imposed a positive duty to provide adequate medical aid when necessary, and that that duty having been wilfully neglected by the prisoner, and death having ensued from that neglect, the prisoner was properly convicted of manslaughter.

CASE stated by Blackburn, J.

The prisoner was indicted at the Central Criminal Court for the manslaughter of Charles Downes.

It appeared on the trial by the evidence that Charles Downes was an infant who, at the time of his death, was a little more than two years old. The child had been ill and wasting away for eight or nine months before its death. The prisoner, who resided at Woolwich, was the father of

the deceased, and had during the whole of this time the custody of the child.

26] *The prisoner was one of a sect who call themselves the Peculiar People. During the whole period of the child's illness he did not procure any skilled advice as to the treatment of the child, but left it to the charge of women who belonged to his sect, and called in at intervals George Hurry, an engine driver, who prayed over the child and anointed it with oil.

The reason of this course of conduct was explained by George Hurry, who was called as a witness. He stated that the Peculiar People never call in medical advice or give medicines in case of sickness. They had religious objections to doing so. They called in the elders of the church, who prayed over the sick person, anointing him with oil in the name of the Lord. This he said they did in literal compliance with the directions in the 14th and 15th verses of the 5th chapter of the Epistle of St. James, and in hope that the cure would follow.

This course was pursued with regard to the deceased infant during its illness. The prisoner consulted the witness Hurry as to what was the matter with the child, and as to what should be given to it. They thought it was suffering from teething, and he advised the parents to give it port wine, eggs, arrowroot, and other articles of diet which he thought suitable for a child suffering from such complaint, all of which were supplied accordingly. There was no evidence that this treatment was mischievous, and though this was probably not logically consistent with the doctrines of his sect as described by him, the learned judge saw no reason to doubt that it was all done in perfect sincerity.

He was asked by the counsel for the prosecution whether if one of their sect met with an accident, such as a broken bone, their principles would prevent their calling in a surgeon to set it, and he answered that he thought they probably would call in a surgeon in such a case, but it had never yet arisen. He was asked whether they trusted to nature in cases of childbirth. He said they did not call in midwives, which would be against their principles, but that several sisters of their persuasion were as skilful as any midwives, and that they assisted the women in labor.

He was further asked whether he had not himself, on the trial of Hurry, before Mr. Justice Byles, promised that in 27] future *medical advice should be called in when necessary. He explained that in that case the disease was infectious, and that he understood the judge to say that the law

forbade them to endanger the lives of others, and as it was one of their principles to obey the law, he had given a pledge that they would call in medical advice where the disease was infectious, which pledge they had kept.

The learned judge here interposed, and asked him whether he would now give a similar pledge in cases where the sick person was a helpless infant, taking the law from him to be that though an adult, who could judge for himself, might refrain from calling in skilled advice without transgressing any law, those who had the charge of a helpless infant were bound to procure it where it was necessary. If he would give such a pledge the learned judge said he had no doubt the prosecutors would be perfectly satisfied, and give no further evidence. He would not, however, do more than promise that he would bring the point before the next assembly of his church. The prosecution, therefore, proceeded. The case added that though all this might show that these Peculiar People were not logically consistent in their tenets and practice, the learned judge saw no reason to doubt that they were sincere.

It was admitted on the part of the prosecution that the child was kindly treated, kept clean, and furnished with sufficient food, and nursed kindly by the mother and the women of the sect.

Evidence was then given that the prisoner had sufficient means to procure skilled advice, which was easily to be obtained at Woolwich. That neither he nor the elder had any competent skill, the disease of which the child died having nothing whatever to do with teething, but being chronic inflammation of the lungs and pleura, which was of long standing, and was a disease which might have been cured at any time if competent advice had been obtained, and probably, though not certainly, would have been so cured if the advice had been called in in the early stages of the complaint.

The prisoner, in his own defence, said that he sincerely believed that by abstaining from calling in medical aid he gave the child the best chance of recovery, as if he showed a want of faith he thought he could not rely on the promise which he thought was given. The prisoner had no counsel.

*The attention of the learned judge being called to the [28 decisions of Byles, J., in *Reg. v. Hurry* (1), and Pigott, B., in *Reg. v. Hines* (2), which seemed to him contradictory, he expressed his intention to raise the question for the

(1) 76 Central Criminal Court Sessions Paper, 63.

(2) 80 Central Criminal Court Sessions Paper, 309.

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opinion of this court. He did not reserve any question on the sufficiency of the evidence to prove the cause of the death of the child, or any of the questions of fact, that being a matter which he thought he was bound to decide on his own responsibility. And, accordingly, the case only stated the evidence in so far as it was necessary to make the direction to the jury and the questions put to them intelligible. But taking it that there was sufficient evidence to warrant the findings in fact of the jury, the learned judge reserved everything else.

The learned judge told the jury that the law casts on the father, who has the custody of a helpless infant, a duty to provide according to his ability all that is reasonably necessary for the child, including, if the child is so ill as to require it, the advice of persons reasonably believed to have competent medical skill, and that if death ensues from the neglect of this duty it is manslaughter in the father neglecting the duty. He told them that he did not, as at present advised, think it any defence that the prisoner sincerely believed that he ought not to provide such advice, nor that he believed that he was doing the best for the child, if he had not, in fact, competent skill and knowledge himself. After explaining this more fully, he asked the jury four questions, which, to prevent any risk of mistake, were reduced to writing, and handed to them. They answered all in the affirmative. The following is a copy of the writing handed to the jury, and their answers:

"Did the prisoner neglect to procure medical aid for the helpless infant when it was in fact reasonable so to do, and he had the ability?—Yes.

"Was the death caused by that neglect?—Yes.

"Unless both of these are proved, he is not guilty. If both proved, find him guilty, but then say further:

29] *"Did the prisoner *bona fide*, though erroneously, believe that medical advice was not required for the child?—Yes.

"Or *bona fide* believe that it was wrong to call in medical aid?—Yes."

The learned judge thereupon directed the verdict of guilty to be entered, and admitted the prisoner to bail.

The question for the opinion of this court was whether the conviction so obtained on this direction and those findings should stand or be set aside.

No counsel appeared for the prisoner.

Straight, for the prosecution: The authorities are not in harmony as to whether this conviction could be sustained at

common law. The ruling of Byles, J., in *Reg. v. Hurry* (¹) is clearly in favor of it, while those of Willes, J., in *Reg. v. Wagstaffe* (²), and Pigott, B., in *Reg. v. Hines* (³), tend the other way. But 31 & 32 Vict. c. 122, s. 37 (⁴), now imposes upon a parent a positive statutory duty to procure medical aid for his child, and death having been found to have ensued from the wilful neglect of that duty, it is manslaughter.

LORD COLERIDGE, C.J.: Speaking for myself alone, I may say that had it not been for the statute to which we have been referred, I should have entertained great doubt upon this case; for, apart from the argument founded upon the statute, I think the observations in the cases cited before Willes, J., and Pigott, B., are deserving of the greatest consideration. But it is not necessary that I should express any opinion upon the question, for I assent to the argument founded upon the statute. The statute *makes it an [30 offence punishable summarily wilfully to neglect to provide adequate medical aid for a child. By wilfully neglecting, I understand an intentional and deliberate abstaining from providing the medical aid, knowing it to be obtainable. In the present case the prisoner, from motives with which I have nothing to do, did wilfully neglect to provide it. If he had been proceeded against summarily under the statute he would clearly have been liable. To cause death by culpable neglect is manslaughter, and the neglect on the part of the prisoner which caused death was a wilful disobedience to the law, a wilful neglect of the duty imposed by statute. It was, therefore, culpable neglect. On that short and distinct ground I think the conviction must be affirmed.

BRAMWELL, B.: I am of the same opinion. I agree with my Lord Coleridge as to the difficulty which would have existed had it not been for the statute. But the statute imposes an absolute duty upon parents, whatever their conscientious scruples may be. The prisoner, therefore, wilfully,—not maliciously, but intentionally, disobeyed the law, and death ensued in consequence. It is, therefore, manslaughter.

(¹) 76 Central Criminal Court Sessions Paper, 63.

(²) 10 Cox, Cr. C., 530.

(³) 80 Central Criminal Court Sessions Paper, 309.

(⁴) By 31 & 32 Vict. c. 122, s. 37, "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen

years, whereby the health of such child shall have been or shall be likely to be seriously injured, he shall be guilty of an offence punishable on summary conviction, and being convicted thereof before any two justices shall be liable to be imprisoned for any period not exceeding six months, with or without hard labor...."

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MELLOR, J.: I am of the same opinion, and upon the same grounds.

GROVE, J., and POLLOCK, B., concurred.

Conviction affirmed.

Solicitor for prosecution: *W. Farnfield.*

See 18 Eng. Rep., 425 note; *State v. Smith*, 65 Maine, 257.

[Law Reports, 1 Queen's Bench Division, 31.]

Nov. 8, 29, 1875.

[IN THE COURT OF APPEAL.]

31] *SMITH v. THE UNION BANK OF LONDON (¹).

Banker's Check—Effect of crossing with Name of Banker—Bona fide Holder for Value—Effect of Statute 21 & 22 Vict. c. 79, s. 2.

A. being indebted to plaintiff, gave him a check for the amount, payable to plaintiff's order, upon the defendants, a banking company. Plaintiff indorsed his name on the check, and crossed it with the name of his bankers, "London and County Banking Co." The check was stolen and passed for full value to C. C. paid it into his bankers, the London and Westminster Bank; and they presented it to the defendants, who paid it to them notwithstanding the crossing, "London and County Banking Co." Plaintiff brought an action against defendants for a conversion, and for so paying the check, relying on 21 & 22 Vict. c. 79, s. 2, which enacts that a check on a banker, payable to order or bearer and uncrossed, may be crossed by the holder with the name of a banker, and such crossing shall be deemed a material part of the check, and the banker upon whom it is drawn shall not pay it to any other than the banker named in the crossing:

Held (affirming the judgment of the Queen's Bench), that the statute did not affect the negotiability of the check; the plaintiff had indorsed the check, so that C. had become *bona fide* holder of it before it was presented to the defendants, and the plaintiff was not the holder; and there was nothing in the statute to give the plaintiff, who had ceased to be the holder, any right of action against the defendants.

ERROR from the judgment of the Court of Queen's Bench in favor of the defendants on a special case (¹).

Action to recover £21 9s., the amount of a check drawn by Richard Mills and others, the directors of the Civil Service Co-operative Association, upon defendants, a banking company, payable to plaintiff's order, which check the association, on the 9th of January, 1874, delivered to the plaintiff in payment of a debt of £21 9s. due from them to him; and he accepted the check as payment conditionally on it being honored, and gave the association a receipt for the amount.

The plaintiff indorsed his name on the check and wrote across it the name of his bankers, the London and County Banking Company. While the plaintiff's servant was taking

(¹) Affirming 13 Eng. Rep., 238.

(²) Law Rep., 10 Q. B., 291.

the check to the plaintiff's bankers it was stolen from him and sold by the *thief to Robert Thurger for £8 10s., [32 who passed it for full value to C., a customer of the London and Westminster Bank, and C. soon afterwards paid it into that bank. They presented it to the defendants for payment, and the defendants paid it to the London and Westminster Bank and returned it to the drawers.

At the time the defendants paid the check it was crossed with the name of the plaintiff's bankers, the London and County Banking Company, and with two transverse lines; and such crossing was made and placed on the check by the plaintiff in such manner as to form and be a material part of the check within 21 & 22 Vict. c. 79, s. 2⁽¹⁾. The name of the London and Westminster Bank was not written across the check when it was paid by the defendants.

The question for the opinion of the court was whether the plaintiff is entitled to recover from the defendants for so paying the check or for converting the same.

Nov. 8. *J. Brown*, Q. C. (with him *Collyer*), for the plaintiff.

D. Walker, for the defendants.

*The arguments and cases cited were the same as in [33 the court below.

Cur. adv. vult.

Nov. 29. The judgment of the court (Lord Cairns, C., Lord Coleridge, C.J., Bramwell, B., and Brett, J.) was delivered by

(¹) 21 & 22 Vict. c. 79, s. 1: "Whenever a check or draft on any banker, payable to bearer or to order, on demand, shall be issued crossed with the name of a banker, or with two transverse lines with the words 'and company,' or any abbreviation thereof, such crossing shall be deemed a material part of the check or draft, and, except as hereafter mentioned, shall not be obliterated, or added to, or altered by any person whomsoever after the issuing thereof; and the banker upon whom such check or draft shall be drawn shall not pay such check or draft to any other than the banker with whose name such check or draft shall be so crossed, or if the same be crossed as aforesaid without a banker's name, to any other than a banker."

Sec. 2: "Whenever any such check or draft shall have been issued uncrossed, or shall be crossed with the words 'and company,' or any abbreviation thereof,

and without the name of any banker, any lawful holder of such check or draft, while the same remains so uncrossed, or crossed with the words 'and company,' or any abbreviation thereof, without the name of any banker, may cross the same with the name of a banker; and whenever any such check or draft shall be uncrossed, any such lawful holder may cross the same with the words 'and company,' or any abbreviation thereof, with or without the name of a banker; and any such crossing as in this section mentioned shall be deemed a material part of the check or draft, and shall not be obliterated, or added to, or altered by any person whomsoever after the making thereof; and the banker upon whom such check or draft shall be drawn shall not pay such check or draft to any other than the banker with whose name such check or draft shall be so crossed as last aforesaid."

LORD CAIRNS, C.: In this case the facts are as follows: Mills and others drew a check on the defendants payable to the order of the plaintiff, the plaintiff received it, indorsed it, and wrote across it the name of the London and County Banking Company. It was stolen, never reached the London and County Banking Company, but came to the hands of a customer of the London and Westminster Bank as a *bona fide* holder for value. He paid it into that bank, who presented it to the defendants. They paid it. The plaintiff then brought this action, treating himself as the owner of the check, and the defendants as having wrongfully converted it, and also claiming the amount of it on the ground that the defendants have infringed to his loss the statute 21 & 22 Vict. c. 79 (¹).

The question is, whether any action is maintainable by the plaintiff against the defendants.

It is quite certain that before that statute no action would have been maintainable on these facts. By the plaintiff's indorsement in blank the check became payable to bearer, and would have continued payable to bearer, whoever that bearer might be, banker or other. The crossing of the check, if without the drawer's authority, could have no effect on his mandate to his banker, if with his authority (as it may well be taken to be, considering the well-known usage of holders of checks crossing them with a banker's name), it would in effect be the drawer's direction to the drawee. Still (before the statute) the check would have remained a check payable to bearer, with, at most, a direction to pay it to no bearer but a banker; or rather, according to the cases, with only a caution or warning to the drawees, that care must be used in paying it to any one else: *Bellamy v. Majoribanks* (²); *Carlton v. Ireland* (³). Those 34] cases, and that of *Simmons v. *Taylor* (⁴), clearly show that, whatever may have been the effect of a crossing, the negotiability of the check was not thereby restrained. Then, have the statutes restrained it? It is impossible to hold that they have. There is not a word in them to that effect. Their sole object is to give a direction to the banker who is drawee. The first, 19 & 20 Vict. c. 25, recites that its object is to provide that drawers or holders of drafts, payable to bearer or order on demand, may be enabled effectually to direct the payment of the same only to or through some banker. It then enacts that the crossing shall have

(¹) See *ante*, p. 32, n. (1).

(²) 7 Ex., 389; 21 L. J. (Ex.), 70.

(³) 5 E. & B., 765; 25 L. J. (Q. B.), 113.

(⁴) 2 C. B. (N.S.), 528; 4 C. B. (N.S.), 463; 27 L. J. (C.P.), 45, 248.

the force of a direction to the bankers upon whom the check is drawn that it is to be paid to or through some banker, and the same shall be payable only to or through some banker. The Courts of Common Pleas and Exchequer Chamber in *Simmons v. Taylor* ⁽¹⁾ both expressed opinions that this did not restrain the negotiability of the check. The other statute, 21 & 22 Vict. c. 79, enacts this more at large, with provisions against obliteration of the crossing. It says the crossing shall be deemed a material part of the check, but it says so for the purpose of forbidding its obliteration. The direction to the drawee, as to whom he is to pay it to, remains the same. The Legislature might have enacted that any one taking a crossed check should take it at his peril, and get no better title than his transferor had. It has not done so. We cannot say that it has by implication restrained the negotiability of the check. We must say, then, that the holder of the check, the customer of the London and Westminster Bank, who presented it to the defendants, was the lawful holder, entitled to retain it against the plaintiff and all the world. Mr. Brown, indeed, admitted this. But we have thought it right to examine into the matter, because, if that admission is well founded, our judgment must be for the defendants. For if the holder was a lawful holder, and the plaintiff never could have procured payment of the check, how is he damnified by the defendants having paid it? Suppose, instead of their paying it, the holder had handed it to them for value, which he might have done had he kept an account with them. Or he might have gone to the drawers and exchanged this check for a new one not crossed. But surely if he might have done that, *he and the drawers might have gone to the [35 defendants and requested payment to him notwithstanding the crossing: as whatever may be done indirectly may be done directly. Or the holder might have opened an account with the London and County Bank and paid the check in, or got some friend to do so; and then the defendants must have paid it, or dishonored it, and then the drawers would be liable on it. It never can have been the intention of the Legislature that matters should be brought to a dead lock, where the holder could keep possession of the check, and yet be unable to get payment by consent of drawers and drawees. Such an enactment would leave the value where it ought not to be, viz., with the drawer.

It is asked, what then is the effect of the statute in enabling the payee to cross a check? We think the answer is

⁽¹⁾ 2 C. B. (N.S.), 528; 4 C. B. (N.S.), 463; 27 L.J. (C.P.), 45, 248.

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easy. It imposes caution, at least, on the bankers. But, further, by its express words it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it if paid contrary to his altered direction. This must often operate for the benefit of the payee or holder who had crossed the check. Further, if in addition to the check being crossed, the signature of the payee was forged, he would retain his property as pointed out by Mr. Justice Blackburn (¹), and could recover it from the banker notwithstanding 16 & 17 Vict. c. 59, s. 19, which protects a banker paying on a forged indorsement.

The case may be put in another way. The plaintiff cannot maintain an action for the conversion of the check, for he had no property in it. He cannot maintain an action on the ground that the defendants have paid the check contrary to the statute, because, though an action lies by the person grieved where the provisions of a statute have been infringed, yet that is only when those provisions are for his direct benefit, and he has sustained loss by their infringement. Here the prohibition of payment except to a banker is for the direct benefit of the drawer, indirectly only for the benefit of any holder of the check. The drawer, if any, is the person grieved. As we have shown, the plaintiff is no loser by the check having been paid, as another person had [36] *become the lawful holder of it. Further, the drawers might refuse to be debited with it as having been paid contrary to their mandate as altered by the statute. It cannot be that in addition to this the defendants are liable to this action.

If the statute had meant to prevent any person becoming lawful holder of a crossed check unless he derived title through lawful holders, this ought to have been, and might easily have been, expressed. If it meant that a man might be a lawful holder, but in no way entitled to the money—a not very intelligible proposition—this ought to have been expressed.

We may observe that s. 2 of 21 & 22 Vict. c. 79 is inaccurate. It leaves out a provision for a check crossed generally "and Co." or "and Company."

The judgment must be affirmed.

Judgment affirmed.

Solicitor for plaintiff: *J. Terry.*

Solicitors for defendants: *Lyne & Holman.*

(¹) Law Rep., 10 Q. B., at p. 296.

[Law Reports, 1 Queen's Bench Division, 86.]

Nov. 8, 1875.

[IN THE COURT OF APPEAL.]

PENDLEBURY v. SAMUEL GREENHALGH (¹).

Negligence—Principal and Agent—Surveyor of Highways, Liability of, for Misfeasance—5 & 6 Wm. 4, c. 50, s. 56.

Defendant was surveyor of highways, appointed by the vestry of a parish at a salary. By a resolution of the committee of management for the highways, appointed by the vestry, it was ordered that about 150 yards of a road should be raised, and the defendant, as surveyor, was directed to carry out the resolution. Defendant contracted with G. to do the labor at 8½d. per yard, the vestry finding stones and materials. G. worked himself, and employed and paid his own men, and the defendant, as surveyor, employed men to cart materials to the ground. Defendant set the work out, and determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee. The work was carried out by raising one-half of the width of the road about a foot, leaving the other half at its old level; and a considerable length of road was so left without light or fencing at night; and, in consequence of this, the dog-cart of the plaintiff, which he was driving along the road, was upset and he was injured. Defendant had been previously warned of the dangerous condition of the road. The jury found that leaving the road in its then state, without light or warning, was negligence; but that [37] defendant did not personally interfere in doing the work, or directing the road to be left as it was:

Held, the court having power to draw inferences of fact, that the defendant was liable.

Taylor v. Greenhalgh (10 Eng. R., 135; Law Rep., 9 Q. B., 487), distinguished.

Semble, that s. 56 of 5 & 6 Vict. c. 50 (which imposes a penalty on a surveyor who causes any heap of stones or other matter to be laid on the highway, and allows it to remain there at night without proper precautions), did not apply to such a case.

APPEAL from the decision of the Court of Queen's Bench, making absolute a rule to enter a verdict for the defendant.

The cause was tried before Mellor, J., at the Manchester Winter Assizes, 1872.

The defendant is the surveyor of highways for the township of Tottington Lower End, appointed by the vestry at a salary; and the action was brought to recover damages for personal injuries sustained by the plaintiff through a fall from a dog-cart which he was driving along a road within the said township, under the following circumstances:

Shortly before the accident in question, it had been ordered by a resolution of the committee of management for the highways, appointed by the vestry, that a part of the road, about 150 yards in length, should be raised, and the defendant was, as such surveyor, directed to carry out such resolution.

The defendant accordingly contracted with one John

(¹) Distinguishing 10 Eng. Rep., 135.

Greenhalgh to do the labor at 3½d. per yard, the vestry finding stones and materials ⁽¹⁾.

John Greenhalgh worked himself, and employed and paid his own men, and proceeded to perform the work accordingly, and the defendant, as surveyor, employed men to cart materials to the ground.

The defendant stated that he set the work out and determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee.

The work was being done by raising about one-half of the width of the road about a foot or fifteen inches, leaving the other half at its old level, and at the time of the occurrence [38] in question a *considerable length of road had been so dealt with, one-half of the width being a foot or more higher than the other half.

No fence, or light, or any other protection was put up to warn persons using the road at night of the difference of level.

On the night of the 23d of May, 1872, the plaintiff, in driving along the road, came in contact with the part of the road which had been raised to a higher level, and his vehicle was upset, and he himself injured.

The plaintiff was not guilty of any contributory negligence.

The defendant, before the accident, had been warned by persons using the road that its condition was dangerous, but took no steps to provide any protection until after the accident, when he caused a light to be put up.

The jury found that the leaving the road in its then state, without light or warning, was negligence, but that the defendant did not personally interfere in doing the work or directing the road to be left as it was.

A verdict was entered for the plaintiff, damages £20, and leave was reserved to the defendant to move to enter the verdict for him, the court to have power to draw inferences of fact. A rule was obtained accordingly, on the ground that no personal liability on the part of the defendant was shown.

This rule was afterwards made absolute, following the decision of the court in *Taylor v. Greenhalgh* ⁽²⁾, which was another action arising out of the same accident.

Ambrose, Q.C., for the plaintiff: The defendant took an active part in the levelling of the road, and was not the mere instrument by whom the contract was made on behalf

⁽¹⁾ In answer to the court it was stated by counsel that the agreement was not in writing.

⁽²⁾ Law Rep., 9 Q. B., 487.

of the committee with John Greenhalgh, as the Court of Queen's Bench seem to have thought. First, the interference with the highway was an illegal act; there was no power in the vestry to give the order to alter the level; all that the surveyor or committee of management can do is to keep the roads in repair: see ss. 6, 9, and 18 of 5 & 6 Wm. 4, c. 50.

[LORD COLERIDGE, C.J.: Surely the parish have power to alter the level?]

*Not without first obtaining an order of justices. But, [39 secondly, assuming the work to be *prima facie* authorized in law, still the defendant is liable for the negligent mode in which the work was left.

[LORD CAIRNS, C.: Is there any case in which a surveyor of highways has been held liable?]

There is a class of cases, such as *Young v. Davis* (*), in which a surveyor has been held not liable, but that is only for nonfeasance, and the principle is, that he stands in the position of the parish, and a parish can only be indicted for the non-repair of a highway. Here the act is an act of misfeasance in leaving the road in a dangerous state without fence or light. *Foreman v. Canterbury* (**) shows that such a public body as the committee of the vestry for highways would be liable, and the same principle applies to the defendant, their surveyor, if he be himself guilty of negligence. In *Newton v. Ellis* (*), it was a question of notice of action, but it was never suggested that the surveyor would not have been liable for personal negligence under similar circumstances to the present.

[LORD CAIRNS, C.: It must be taken that the defendant employed a competent person to do the work.]

John Greenhalgh was only employed to do the labor. Although the jury have found that the defendant did not personally interfere in doing the work and in directing the road to be left as it was, yet the court are to draw inferences of fact, and the defendant himself stated that he superintended the work on behalf of the committee; and he had express notice of the dangerous state the road was left in. Lastly, the defendant would be liable by virtue of s. 56 of 5 & 6 Wm. 4, c. 50 (*), which imposes a penalty on a sur-

(*) 2 H. & C., 197.

(*) Law Rep., 6 Q. B., 214.

(*) 5 E. & B., 115; 24 L. J. (Q.B.), 337.

(*) 5 & 6 Wm. 4, c. 50, s. 56: "If any surveyor shall lay, or cause to be laid, any heap of stone, or any other matter or thing whatsoever, upon any

highway, and allow the same to remain there at night to the danger or personal damage of any person passing thereon, all due and reasonable precaution not having been taken by the surveyor to guard against the same, he shall forfeit for every such offence any sum not exceeding £5.

veyor who leaves stones or other matter in a dangerous 40] *position on a road, on the principle of the cases cited in the court below (*).

[LORD CAIRNS, C.: That section applies to leaving materials in a dangerous position; it was the road itself here that was dangerous, not the materials.]

J. Edwards, Q.C., for the defendant: No point was made at the trial that the act of raising the level of the road was unlawful; it must be taken, therefore, for the present purpose, to have been lawful; and then the case simply amounts to an attempt to make the defendant, *quod* surveyor, liable, although he did not personally interfere.

[LORD COLERIDGE, C.J.: Is that so on the facts? *Foreman v. Canterbury* (*) seems very much in point.]

Ambrose, Q.C., was not heard in reply.

LORD CAIRNS, C.: Although the conclusion at which this court has arrived does not agree with that of the Court of Queen's Bench, the difference is not so much a difference on any point of law as a difference between the view taken by the Court of Queen's Bench of the facts and the view which this court takes of the facts as stated in the case. The first question, as in most of these kinds of cases, is one of fact, and we have to ascertain what was the precise state of facts with regard to the steps taken by the defendant to carry out the work directed to be done by the resolution of the committee. We may assume that what the committee resolved should be done was perfectly lawful if done in a proper manner, viz., the alteration of the level of the highway. The case states: "It had been ordered by a resolution of the committee of management for the highways appointed by the vestry that a part of the road, about 150 yards, should be raised, and the defendant was, as such surveyor, directed to carry out such resolution." Now, I will assume that the defendant, as he could not have carried out the resolution with his own hands, would not have been responsible in the present instance, if he had contracted in a proper manner with a third person to carry out the work with all its incidents. But he did not contract with John Greenhalgh for the performance of the work as a whole. He contracted, at *most, for the performance of a part only. The case proceeds: "The defendant accordingly contracted with one John Greenhalgh to do the labor at 3½d. per yard, the vestry finding stones and materials. John Greenhalgh worked himself, and employed and paid his own men, and proceeded to perform the work, and the defendant, as sur-

(*) Law Rep., 9 Q. B., at p. 489, n. (1). (2) Law Rep., 6 Q. B., 214.

veyor, employed men to cart materials to the ground. The defendant stated that he set the work out and determined the levels, but had nothing to do with the paving himself, except"—a most material exception—"superintending on behalf of the committee." It was very properly admitted on the argument that it was necessary that during the night the road under alteration should be fenced off or lighted, in order to avoid danger to persons driving along it. Now, the work to be done was of a complex kind; it consisted of four parts, the materials, labor, superintendence, and, as incident to the work, lighting and fencing during the night. We have, therefore, to look and see what the defendant contracted for with John Greenhalgh out of these four items. I cannot see that he—it is stated expressly—contracted for anything except labor; the materials were found by the vestry, superintendence by the defendant, as surveyor. By whom was the fencing and lighting to be supplied? The defendant, no doubt, might have stipulated that the man supplying the labor should supply the light or fencing. The contract, we are informed, was not in writing, and we must take it that the labor alone was contracted for. If the defendant did not contract for the fencing or lighting, then the duty of fencing and lighting remained in the defendant, for which he remained responsible. Therefore, without laying down any general rule, I think, under the circumstances of this case, the defendant continued liable, and that the plaintiff is entitled to judgment.

LORD COLERIDGE, C.J., BRAMWELL, B., and BRETT, J., concurred.

Judgment reversed.

Solicitors for plaintiff: *Shaw & Tremellen, for P. & J. Watson, Bury.*

Solicitors for defendant: *Clarke, Woodcock & Rylands, for Grundys, Manchester.*

[Law Reports, 1 Queen's Bench Division, 42.]

Nov. 8, 1875.

[IN THE COURT OF APPEAL.]

42] *SNEESBY V. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY (¹).*Railway Company—Negligence—Consequential Damages—Court of Appeal—Practice on Argument of Appeal.*

A herd of plaintiff's beasts were being driven at 11 p.m. along an occupation road to some fields. The road crossed a siding of the defendants' railway on a level, and while the cattle were crossing the siding the defendants' servants negligently sent some trucks down an incline into the siding, which separated the cattle from the drovers and frightened them, and they rushed away. Six of them were ultimately found at between 8 and 4 a.m. lying dead or dying on another part of the railway; and it appeared that they had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level crossing, had got into the garden through defect in the fences, and so on to the line:

Held (affirming the judgment of the Queen's Bench), that, as defendants had been guilty of negligence which caused the drovers to lose control over the cattle and caused the cattle to become infuriated, it was no answer that if the fence of the garden had not been defective the accident would not have happened; and that consequently the damages were not too remote.

On the argument of a case in the Court of Appeal two counsel will be heard on either side.

APPEAL from the decision of the Court of Queen's Bench making absolute a rule to enter the verdict for the plaintiff (¹).

The following are the material parts of the case:

The plaintiff is a cattle dealer and attends the Wakefield market.

The defendants are the owners of a main line of railway and branches at Wakefield.

On the 29th of April, 1874, twenty-nine beasts of the plaintiff were sent to Wakefield by railway, and about 11 o'clock p.m. the plaintiff's servants, being competent persons and in sufficient numbers for the purpose, drove the beasts with others from a yard, where they had been temporarily put up and fed, along an occupation road, which is crossed by sidings of the defendants, and is continued under the Wakefield, Pontefract, and Goole branch of the defendants' railway in the direction of a field, belonging to

43] *Mr. Jaques, on the south side of the defendants' said main line of railway, to be kept there ready for the next morning's market, this being their lawful and proper road.

The sidings cross the occupation road on a level, and are not fenced in any way from the road; there is a steep in-

(¹) Affirming 8 Eng. Rep., 337.

(¹) Law Rep., 9 Q. B., 263.

cline from the level of the railway to the level of the road, and while the plaintiff's beasts were crossing the sidings several trucks were by the negligence of the defendants' servants allowed to run down the siding between the beasts in question and the persons in charge of them, and so separated the beasts from the drovers; whereupon the beasts became alarmed and rushed along the occupation road out of the control of their drovers.

Six of these beasts were found the following morning between three and four o'clock on the defendant's main line of railway dead or dying, at a distance of about a mile from the spot where they appeared to have first got on to the defendants' main line of railway.

On following the tracks of these beasts, it appeared that after they had crossed the sidings they passed along the road through an archway under the Wakefield, Pontefract and Goole branch railway, and beyond Jaques' field, and had gone along the occupation road about a quarter of a mile, where they broke through the fence, which was in a defective state, and which separated the road from an orchard and garden belonging to the defendants and adjoining their main line of railway, and had passed along it to the east end or far corner where there was no fence and so on to the main line of railway, over which they wandered for some distance in the direction of Kirkthorpe, where they were found.

The garden or orchard is the property of the defendants, but was in the occupation of a tenant from year to year under an agreement, by the terms of which the tenant was bound to repair the fences adjoining the occupation road.

Upon the above facts the presiding judge directed a nonsuit, with leave to move to enter a verdict for £153 for the plaintiff.

A rule was obtained accordingly on the grounds that the defendants were guilty of negligence, and also of a breach of duty in respect of the fences, and were liable for the death and injury of the cattle.

*The Court of Queen's Bench made the rule absolute. [44

On appeal,

Herschell, Q.C., for the defendants, contended that there was no duty on the defendants to fence the garden, and that the insufficiency of the fence was the immediate cause, if not the *causa sine qua non* of the death of the beasts; and the damages were therefore too remote, and the defendants not liable.

Beasley, on the same side, had nothing to add on the
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present occasion, but asked for the direction of the court as to whether more than one counsel could be heard.

LORD CAIRNS, C.: The practice must be uniform in this court, and will be assimilated to the former practice in the Court of Appeal in Chancery, and two counsel will therefore be heard for each side.

Wills, Q.C., and *J. W. Mellor*, Q.C., for the plaintiff, were not heard.

LORD CAIRNS, C.: It appears from the facts as stated in the case, that the defendants' servants were guilty of negligence in allowing the trucks to move down at a time when, if they had not been guilty of negligence, they would have seen the cattle were crossing. The result of this negligence was twofold. First, the trucks separated the cattle from their keepers; secondly, the cattle were frightened, and became infuriated, and were driven to act as they would not have acted in their natural state. Everything that occurred or was done after that must be taken to have occurred or been done continuously: the cattle rushed on in a state of fury, passed along the occupation road, charged the fence of the garden, and so got on to the railway, and were ultimately killed.

It is no answer on the part of the defendants to say that the fence was an imperfect fence. It might just as well have been that there was no fence at all. The question would have been precisely the same. The case, moreover, does not state that the fence would have been insufficient if the cattle had been in the ordinary state of cattle. But it is enough to say on the present occasion that the defendants 45] cannot justify against the *consequences of their negligence by saying that the fence in question was not a perfect fence as between landlord and tenant.

LORD COLERIDGE, C.J., BRAMWELL, B., and BRETT, J., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Clarke & Sons, for Wainwright, Manchester.*

Solicitors for defendants: *Clarke, Woodcott & Co., for Grundy, Manchester.*

[Law Reports, 1 Queen's Bench Division, 45.]

Nov. 9, 1875.

[IN THE COURT OF APPEAL.]

EVANS V. HOOPER.

Marine Insurance—Mutual Insurance Association—Manager suing for Contributions.

The manager of a mutual insurance association cannot maintain an action for contributions due under the rules from any member, although those rules have been agreed to by the member and profess to give such a power.

Gray v. Pearson (Law Rep., 5 C. P., 568) approved.

Declaration that the defendant was a member of a mutual insurance company and caused himself to be insured in respect of a vessel for a certain time, and that the plaintiff, who was manager of the association, in consideration that the defendant agreed to comply with certain rules which it was agreed between the plaintiff and defendant should form part of the policy, subscribed the policy on behalf of the several members of the association, every member bearing his equal proportion according to the sums mutually insured therein. The declaration set out the rules, which provided how the amount of contributions to be paid by members should be ascertained, and that the manager should have power to sue for the amount due from any defaulting member. Averment that certain contributions became due which the defendant did not pay. On demurrer:

Held, that the action could not be maintained: for that the plaintiff signing on behalf of the members did not take upon himself any liability, and therefore there was no consideration, as between the plaintiff and defendant, for the promise of the defendant.

ERROR from the judgment of the Mayor's Court, London (¹), in favor of the defendant on demurrer to the declaration.

Declaration that the defendant was a member of a certain association called the British Marine Mutual Insurance Association, and by a policy of insurance of the 23d of February, 1873, caused himself to be insured, lost or not lost, from the 20th of February, *1873, to the 20th of Feb- [46] ruary, 1874, upon the body, &c., of the ship Sunk Light Tender, against perils of the seas and other perils and losses more particularly mentioned in the policy, the ship and premises being valued at £400; and the plaintiff, in consideration of the defendant's agreeing to comply with the rules thereafter mentioned subscribed the policy for £300 on behalf of the several members of the association, every member bearing his equal proportion according to the sums mutually insured therein. And the defendant was then and thence, until the commencement of this action, interested in the ship and premises to the amount of the moneys insured by him therein. And it was agreed between the plaintiff and the defendant that certain rules thereunto an-

(¹) The record was brought up through the office of the Queen's Bench,

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nexed should form part of the policy, which rules, so far as material, were as follows :

"1. That the members of this association shall severally, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each other's ships, or shares of ships, from certain dates in each year, against all losses, perils and damages whatsoever.

"2. That the committee for superintending the affairs of this association meet once in every three months, or oftener if required, to examine and decide on claims ; and no member thereof shall act as such in the settlement of his own average or loss.

"4. The manager is empowered to levy contributions of one-fourth part of the estimated premium, which shall be drawn for at two months' date from certain dates in each year, such premiums of insurance to form a fund for the payment of claims. Provided always, that if the losses and expenses exceed the amount of premiums so realized, the deficiency shall be made good by an additional percentage on the premiums to be drawn for, as the committee may determine. But should the premiums so realized exceed the losses and expenses incurred, then the surplus to be proportionately returned.

"5. That the manager's drafts on any member of this association for his proportion of the annual estimated premium and for any additional percentage thereon shall be duly accepted and punctually paid when due, and if any member shall neglect, omit, or refuse to accept any such 47] drafts or to pay his contributions *thereto, his respective ship or ships shall cease to be insured in or by this association, and he shall thenceforth forfeit all claims for or in respect of any loss or average under his policy or policies effected therein, and the manager is hereby authorized and empowered to sue for the amount due from any defaulting member, and, if not recovered, the loss shall be borne proportionately by all the members."

Averment that the plaintiff is the manager referred to in the rules, and that being such manager he levied contributions for the year ending on the 20th of February, 1874, and afterwards it was found that the losses and expenses for the said year exceeded the amount of premiums so realized, and thereupon it became necessary that the deficiency should be made good by an additional percentage on the premiums to be drawn for as the committee might determine. And thereupon the committee declared that the manager should draw on the members in accordance with

rule 4, and among others on the defendant for his proportion of two additional calls of one-fourth, and also of one-half of the estimated premium respectively. And afterwards the plaintiff drew on the defendant as such member as aforesaid for certain amounts, to wit, £7 10s. and £15, being one-fourth and one-half respectively of the defendant's estimated premium; and all things happened, and all times elapsed, and all conditions were fulfilled necessary to entitle the plaintiff to have the said drafts accepted by, and the amounts paid by, the defendant. Yet the defendant did not accept the said drafts, and did not pay the said amounts.

Demurrer and joinder.

The court gave judgment for the defendant, that the declaration was bad in substance.

On error by the plaintiff,

MacLachlan and Lanyon, for the plaintiff: The plaintiff is entitled to sue. This is not an action for a loss, but an action founded on the contract between the plaintiff and defendant. There are, in fact, two contracts, that of underwriting between the defendant and the members, and another between the manager and the person insured to abide by the rules set out.

[*LORD CAIRNS, C.: Must not in legal effect the contract be read as though it said "the plaintiff taking no liability on himself?"]

The consideration for the contract with the plaintiff is that he would subscribe the policy, and this he has done, and as the adequacy of the consideration cannot be looked into, this is sufficient. On the demurrer to the declaration the express contract contained in it is admitted. In *Gray v. Pearson* (1) the question arose on a count for money paid and on accounts stated, and in that case the plaintiff was either a mere volunteer or else he was suing as a public officer. Secondly, it must be taken on the declaration that all the members signed the policy.

J. Brown, Q.C., and *F. Turner*, for the defendant, were not called upon.

LORD CAIRNS, C.: It is quite unnecessary to advert to the second point raised, because it appears to me that the first objection is sufficient to dispose of the case. The declaration states a policy of insurance, in which the defendant is the person insured, and the British Marine Insurance Association are the insurers and underwriters. The policy was signed on their behalf by their manager, and there is a

(1) Law Rep., 5 C. P., 568.

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rule which professes to authorize the manager to sue the persons insured for contribution in case of deficiency of funds. If the matter stopped there, that would amount simply to an attempt by an unincorporated company to authorize their manager to sue on their account. Such an agreement to authorize an agent to sue on behalf of the partnership is a contract that the law does not recognize. But it is argued that the averments in the declaration amount to this, that there was a consideration passing between the manager and the person insured, who agreed that if the manager would underwrite and sign the policy, he, the person insured, would agree to be bound by and obey the rules of the company. Now let us see how the averments stand on that point. The declaration says that the plaintiff subscribed the policy on behalf of the several members of the British Marine Mutual Insurance Association, every member bearing his equal proportion according to the sums mutually insured therein, and that he did so in 49] consideration of the *defendant's agreeing to comply with the rules. This is an averment that the defendant agreed to comply with the rules in consideration of the plaintiff subscribing the policy, not on his own behalf, but on that of the members of the association, and so that his signature should not be taken to import any personal liability, but simply to operate against the members. If so, no consideration is stated. The engagement would be on behalf of the principals, and not on behalf of the agent, and therefore no consideration is shown on which the agent can sue. The judgment must, therefore, be affirmed. .

LORD COLERIDGE, C.J., BAGGALLAY, J.A., and BRAMWELL, B., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Stocken & Jupp.*

Solicitors for defendant: *Keene & Marsland.*

[Law Reports, 1 Queen's Bench Division, 65.]

Nov. 10, 1875.

65] *THE SCHOOL BOARD FOR LONDON, Appellants; THE VESTRY OF ST. MARY, ISLINGTON, Respondents.

Metropolis Local Management Act (18 & 19 Vict. c. 120), ss. 105, 250—" Houses forming a Street"—" Owner."

The vestry of a metropolitan parish, having paved a new street, under 18 & 19 Vict. c. 120, s. 105, assessed the London School Board, in respect of a school-house,

as being "owners" of one of "the houses forming the street." The school-house did not immediately front the street, but stood back from it some seventy or eighty feet, in a large yard, the whole area being about 29,500 square feet. There was a row of eleven small houses (with gardens at the back of them) between this area and the street; but the only access to the school was by a private passage which ran along one side of the last house and garden into the school-yard, with gates opening from the street in question; the width of the passage being twenty feet and the length about sixty-four feet:

Held, that the school-house, though not actually one of the houses "forming the street," yet practically formed part of it, within s. 105.

Baddeley v. Giggell (1 Ex., 819; 17 L. J. (Ex.), 68), followed.

Held, also, that the school board were "owners" within the definition in s. 250 of 18 & 19 Vict. c. 120.

CASE stated by justices of the county of Middlesex, under 20 & 21 Vict. c. 43.

A complaint was made by the respondents, the Vestry of the parish of St. Mary, Islington, against the appellants, the School Board for London, for that the board,—being the owners of the house numbered 127 and of the schools in Cottenham Road, which house and schools abut on and form part of the Cottenham Road, being a new street, within the meaning of 18 & 19 Vict. c. 120, "An act for the better Local Management of the Metropolis," and also the several Amendment Acts of 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102, which has been laid out by the orders of the vestry,—have not paid to the vestry the sum of £261 1s., being the proportion of the estimated expense, as determined by the surveyor of the vestry to be paid by the board, for providing and laying the pavement and making the road, in respect of the house and schools of which the school board are owners.

The complaint was made against the appellants under s. 105 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and s. 77 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102).

*By 18 & 19 Vict. c. 120, s. 105, the vestry or district [66 board may under given circumstances pave a new street; "and the owners of the houses forming such street shall on demand pay to the vestry or board the estimated expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board."

By 25 & 26 Vict. c. 102, s. 77, where the vestry or board shall pave a new street under the powers of s. 105, "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or board to charge the owners

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of land in a less proportion than the owners of house property, should they deem it just and expedient so to do."

At the hearing of the complaint it was admitted on behalf of the appellants that they are the owners of the house No. 127 Cottenham Road, and land and school-buildings in the rear of that house and other houses in that road; that the resolutions of the respondents that Cottenham Road be made and paved under the authority of s. 105, and that the owners of the houses and land forming or abutting on such street should pay the amount of the cost of making such street according to the estimate determined by the surveyor of the vestry were duly passed; that the sum of £261 1s. was duly demanded of them; and that they had refused to pay the same.

The school-buildings and land consist of an area of about 29,500 square feet, being in general shape nearly a rectangular parallelogram, the length (speaking generally), from east to west, was 205 feet, and the width an average of 132 feet. The school-buildings occupy the north-western corner of the area, the rest being open yard or playground. Immediately to the south of this area, and between it and Cottenham Road, is a row of eleven small houses, with a garden or yard at the back of each. These houses front immediately upon Cottenham Road; the length of the frontage being 184½ feet, with a passage at the east end of 20½ feet, and the depth to the back of the yards about 64 feet. The most eastern house of the row is the house No. 127, belonging to the appellants. On the east side of this house is a passage way, 20½ feet wide and 64 feet long, leading from 67] Cottenham Road into the east end of *the school-yard or playground, and so to the school-buildings. This passage is inclosed and shut off from the street by gates under the control of the appellants. There is no access to the school-buildings except through this passage.

The house No. 127 is let to a tenant, and has no connection with the school-buildings.

In December, 1873, the respondents resolved that the Cottenham Road be laid out as a new street under the provisions of the said acts, and the amount of the estimated cost thereof, as apportioned on the appellants, was £10 14s. 9d., as the owners of the house No. 127 in that street, and £250 6s. 3d. as the owners of the land and school-buildings in the rear, and of the land forming the passage or entrance from the street to the school-house, as forming part of and abutting on the said street.

It was stated on behalf of the respondents, and admitted

by the appellants, that the school-buildings and land in question are assessed to the parochial rates as being in Cottenham Road, and that no appeal has been made against such assessment.

It was contended on behalf of the respondents that, under the authority of s. 105 of the Metropolis Management Act, 1855, it is in the discretion of the surveyor of the vestry for the time being to determine the amount of the estimated expenses of making any new street, and in the discretion of the vestry to determine how the proportion in which such expenses should be assessed on the owners of the different houses forming such street, or of the land abutting thereon, shall be calculated by resolving that the proportions in which each such owner should be assessed should be affixed either by the amount of the assessment of the parochial rates, or by the length of frontage to the street of each house or piece of land, or by any other method that may appear equitable to the said vestry, according to the circumstances of each particular case, and that it was not within the power of the justices to interfere with or review the acts of the vestry or surveyor in that behalf.

It was admitted by both parties that, in the calculation of the proportion of the cost of making the street, the same was made not on the length of the frontages to the street, but on the assessment of the respective properties to the parochial rates.

*It was contended by the appellants that they were [68 not liable for the rate as levied on the said schools and land, as they were not, as owners of the said schools and land, owners of "houses forming the street" within the meaning of 18 & 19 Vict. c. 120, s. 105, and that if they were liable at all, they were only liable for a rate levied in respect of frontage.

Under these circumstances, the justices considered that the appellants came within the provisions of the above sections, and that the respondents were entitled at their discretion to apportion the cost either in proportion to the assessment of the properties or according to frontage. They therefore made an order upon the appellants for the payment of the sum of £261 1s.—viz., £10 14s. 9d. in respect of the house No. 127 in Cottenham Road, and £250 6s. 3d. in respect of the school-buildings—as the proportion of the estimated expense of providing and laying the pavement and making the road in the new street.

The question for the court is whether the appellants, as owners of the land and school-buildings, are, as owners of

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a house forming such new street within the meaning of 18 & 19 Vict. c. 120, s. 105, or under 25 & 26 Vict. c. 152, s. 77, as owners of land abutting on such new street, liable to be rated for the making of the street; and if they are, whether the rate or amount should be assessed, at the discretion of the respondents, upon the amount of the frontage or upon the ratable value of the land and school-buildings.

If the court shall decide in the affirmative, the order for the payment of the whole amount claimed by the respondents is to be carried into effect.

If the court shall decide otherwise, an order is to be made for payment of the sums offered to be paid by the appellants, that is to say, £10 14s. 9d. in respect of the house No. 127 Cottenham Road, and the sum of £10 14s. 9d. in respect of the adjoining piece of land or passage way, or such other order to be made as may be directed by the court.

Nov. 6, 10. Sir *H. James*, Q.C. (with him *Marriott*), for the appellants: By s. 105 of 18 & 19 Vict. c. 120, when a new street is to be paved, the expenses are to be borne by "the owners of the houses forming such street;" and by 69] s. 250, "owner" "shall . . . *mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such lands or premises were let at a rack-rent." By s. 77 of 25 & 26 Vict. c. 102, "the owners of the land bounding or abutting on such street shall be liable to contribute towards the expenses, as well as the owners of houses therein;" but the vestry or board have a discretion to charge the owners of land in a less proportion. First, the school board are not "owners" at all within the definition.

[*Thesiger*, Q.C., contra: This point was not intended to be raised; the only question is whether the school-house is so situate as to be within s. 105.]

In the *Plumstead Board of Works v. British Land Co.*(¹), in the Exchequer Chamber, Lord Coleridge, C.J., after citing *Angell v. Paddington* (²), uses language which shows that when the house or land cannot be let at a rack-rent, the trustees are not owners within s. 105.

[*Cockburn*, C.J.: If that case goes the length of deciding that wherever houses in a street are vested in persons so that they cannot let the premises, but must occupy them for the purposes of the trust, they are not owners within the statute, I can only say that I am bound by the decision,

(¹) Law Rep., 10 Q. B., 203.

(²) Law Rep., 3 Q. B., 714.

being in the Exchequer Chamber, but I cannot accede to the reasoning.

MELLOR, J.: Cannot the school board, supposing they found these premises not convenient, have another school-house elsewhere, and let these premises for some other purpose?]

So long as the building is used as a school-house they cannot let it; but it must be admitted that by s. 22 of 33 & 34 Vict. c. 75, they seem to have the same power as to sale, leasing, and exchange as the charity commissioners.

[COCKBURN, C.J.: Leasing must mean leasing at a rack-rent.]

Secondly, on the main question, it is impossible to say that the school-house is one of the houses forming the street called Cottenham Road within s. 105, or that the area of ground in which it is situate is land bounding or abutting on the street within s. 77. The passage, no doubt, may be land within s. 77; but the *respondents have assessed [70 the school-house and the large plot of land, and the question is, whether that is right. How can this school-house be said to form the street when there are houses which form the street between it and the street?

THE COURT then called upon

Thesiger, Q.C. (with him *Besley*), for the respondents: The first point was not intended to be left open, otherwise the power of the board as to leasing would have been set out in the case. The court has, however, disposed of the point; and if any authority were wanting, the case of *Bowditch v. Wakefield Local Board* (*) is expressly in point, that the school board are "owners" within ss. 105 and 250. On the real point the respondents rely mainly on s. 105, and contend that this school-house is a house forming a street within the meaning of that section. *A priori*, the Legislature would intend that the owners of house property benefited by the paving of the street should contribute to the expenses; and as the only access to the school is by this passage from this particular street, it is clear that as much benefit is derived by the house from the paving of the street as if the house fronted entirely on the street.

[MELLOR, J.: That argument would make all the chambers in the Inner or Middle Temple form part of Fleet Street, although there is but one set of chambers actually fronting the street.]

That is a very different case from the present. Here there is but one private entrance to a single house; just as is the

(*) Law Rep., 6 Q. B., 567.

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case with many of the hotels in Paris, and some of the large mansions, such as that of the Duke of Westminster, in London, where there is an entrance fronting the street much narrower than the house which stands back from the street. That house may well be said to form part of the street, although the case would be very different as to the houses similarly situate in a court with a public entrance from the street. It may be observed in support of this view that actual frontage is not the criterion, and that the mode of rating is left open to the vestry and cannot be reviewed: *Nesbitt v. Greenwich Board of Works* ⁽¹⁾; and to charge the expenses in proportion to the ratable value seems a juster mode of assessment than charging in proportion to the 71] mere frontage. Practically, then, and in accordance with principle, and in the sense intended by the Legislature, the school is within s. 105, and forms part of the street. This was the principle of the decision in *Baddeley v. Giggell* ⁽²⁾. The act there in question gave power to impose a rate for the paving of streets in the district upon the inhabitants of houses and other buildings "situate or being within the streets," and the premises in question were situate with regard to the street to be paved almost precisely as the present, except that the passage was not more than half the width of the present, and there was more than one house or building at the back. There were also, with exception of the opening for the gateway, houses fronting the street between it and the houses to be rated. The arguments were similar to the present, that the house and buildings in question were not "within the street;" and the argument contra, on which the court acted, was that the principle of the enactment was that the Legislature intended that those who got the benefit should contribute towards the expense of paving the streets; and the court held that the house and buildings, though not entirely, were practically within the street for the purposes of the act, although the passage, as here, was the only part of the premises actually fronting or abutting on the street. [The learned counsel then read at length the arguments, and dicta, and judgments in that case.] The principle, therefore, of that decision seems to apply directly to the present case. Just as the passage there made the whole premises "within the street" for the purposes of that act, so the passage here makes the school-house part of the street within the meaning of this act ⁽³⁾.

(1) Law Rep., 10 Q. B., 465.

(2) 1 Ex., 319; 17 L. J. (Ex.), 68.

(3) The legislature, in the two statutes

seems to have treated "houses forming such street" in s. 105 of 18 & 19 Vict.

c. 120, as equivalent to "houses in," or

[He also cited the judgment of Quain, J., in *St. Mary, Islington, v. Barrett* ⁽¹⁾, Holroyd, J.'s, judgment in *Doe d. Humphreys v. Roberts* ⁽²⁾, and definition of "street" in s. 250 of 18 & 19 Vict. c. 120.]

Marriott in reply: But for the case of *Baddeley v. Gingell* ⁽³⁾ the argument for the respondents would be altogether wanting in *authority. But the words, "the [72 houses within the street," are very different from "the houses forming the street" ⁽⁴⁾. In former statutes, in *pari materia*, the words had been "fronting," or "bounding or abutting on;" "forming the street," no doubt, was intended to have the same meaning.

[COCKBURN, C.J.: The inference is rather the other way, that the words "forming the street" were intended to have a different, and perhaps a wider, meaning.]

The widest definition is given to the word "street" in the interpretation clause, s. 250; and if houses situate like the present had been intended to be included as in a street, some definition which would include them would have been given. It is putting the greatest violence on language to say that a house which is wholly shut out from the street, having houses fronting the street interposed between it and the street, is one of the houses forming the street, merely because it has a passage of twenty feet opening into the street. It is to be observed that this passage does not open immediately upon the school-house; the passage opens into one end of the large yard, and the house is at the other end of the yard, behind the last of the eleven houses in front.

COCKBURN, C.J.: I think, upon the whole, the rate must be upheld. I own that my mind has fluctuated very much in the course of the discussion, and I by no means intend to say that at this moment my view of the matter is free from doubt. Upon the whole I think the reasons which influence us in upholding this rate, and in putting the construction upon the act of Parliament which we are prepared to do, are sound. The words are "the houses forming such street." I think it must be admitted it is not open to contest that a house, standing in the position which this school occupies, does not physically and actually form part of the street, taking "street" in the sense in which I think it ought to be taken, namely, one of the houses between which the

"within such street," for in s. 77 of 25 & 26 Vict. c. 102, after referring to s. 105 the owners of the land bounding or abutting on such street are made liable to contribute, "as well as the owners of houses therein."

⁽¹⁾ Law Rep., 9 Q. B., at p. 283.

⁽²⁾ 5 B. & Ald., 411.

⁽³⁾ 1 Ex., 319; 17 L.J. (Ex.), 63.

⁽⁴⁾ See note (2), *ante*, p. 71.

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part to be paved is situate,—supposing that it is a street formed of opposite rows of houses; or, if it be not, then that part which is occupied by the highway, as distinguished from the houses. I think it cannot be said that physically [73] and actually a house *standing in the position of this school can form part of the street. But looking to what I cannot help thinking, amid the varying terms and varying phraseology of these acts, was the intention of the Legislature, we are entitled to say that the houses may constructively form part of the street which physically is not included by them. The case of *Baddeley v. Gingell* ⁽¹⁾ is not immediately and directly in point, because the words of the two acts of Parliament are not identical, but I cannot help thinking that, practically, whether a house is said to be within the street or in the street, or spoken of as forming part of the street, it all means one and the same thing. We must look at the justice and the equity of the case, and consider whether a person being the owner of premises so circumstanced should be made to contribute to the paving of the street, it being clearly the intention of the Legislature that the owners of property immediately contiguous to the highway to be paved, and forming part of the street of which that also forms part, shall pay, upon the assumption that they personally are benefited by having put into proper order the street which affords them access to their habitation and premises. That being so, it matters nothing in point of the justice of the case that the house, instead of actually fronting the street, stands in the rear of the street, if it has its access from the street. It is the benefit of access to the premises which must be supposed to be the foundation of the liability which the Legislature thinks fit to impose. It is essential to you to have premises to which the access is from that part of the street which is called highway; it is essential to you that you should have that street well paved, and you get access; it matters nothing practically whether your front door opens actually on to the street, or whether you go up a passage to get to your front door, you equally get the benefit of the street every time, whether on foot or in a carriage, you make use of the street as an access to your house. That being so, although I agree in the strict sense of the term this school does not actually form part of the street, I think constructively it does within what, as I imagine, must have been the view of the Legislature. The old acts had the term “fronting the street.”

(1) 1 Ex., 819; 17 L. J. (Ex.), 63.

That has been omitted, and the words "forming the street" substituted. I think, therefore, that we may put a large and liberal construction upon these terms, and hold [74] that constructively this house forms part of the street. For all practical purposes, with regard to postal matters, and things of that sort, it would be deemed to be a house in the street. I can conceive that there might be behind part of the houses which front to the street valuable property, access to which would be all-important to the owner. The state of the street out of which he gets to his premises may be all-important to him, yet if the argument against this rate were upheld, he would be relieved from all contributions towards that which is a matter of common concern, and from which he, in common with the rest, derives a benefit.

I was very much staggered at first with the consideration, that there are, as every one knows who walks along the streets of London, a great many courts, access to which is from the main street, but if you go into them you will find that in these courts is a congeries of buildings of various forms and shapes, quite distinct from and independent of the street. I do not think, where you have got an old-established court, the access to which from the street is common to the public, open to everybody who likes to go in, that that would fall within this category. If it did, I should hesitate to put the construction upon the act which I am now prepared to put; I do not think it applies to courts of that description. Here we are dealing with private property. The access here is by a private way. It has never been constituted a public thoroughfare, and perhaps never may be. It is a private access to private property, and this private access, to my mind, is the same thing as though the front door opened upon the street. If the front door stood where the private passage does, and the rest of the house stood behind the houses which otherwise form the street, I think the case would be clear. The house would in that sense front the street, and might well be said to form part of the street. I do not think it does so the less because, when you get to the end of this passage, you have to turn to the right hand or to the left to get to the front door. Therefore, thinking we may put this construction on the act of Parliament, and without affirming that a house in this condition is properly described as forming part of a street, having regard to the equitable and just view of the [75] matter, and the one best calculated for the public convenience, I think this rate should be upheld.

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MELLOR, J.: I am of the same opinion. I think this is an *a fortiori* case to that of *Baddeley v. Gingell* ⁽¹⁾; and, quite independently of that case, I think I should be disposed to come to the conclusion at which my Lord Chief Justice and my Brother Quain have arrived. I cannot help thinking that many of the arguments which have been addressed to us are considerations which may be taken into account by the vestry in assessing the *quantum* of the rate. I think this school-house may be said to form part of that street. It is true there is an inferior building in front of it, and it is in a space behind the immediate row of houses; but there is reserved an opening to the school-house, and that is the only access to the school and school-house premises for all purposes. I think they have the same benefit that any immediate frontager has; and I cannot help thinking that the variations in the acts of Parliament referred to make very much against Mr. Marriott's argument. I think the omission of the words "frontage" and "fronting the street"—changing that expression, and leaving it out of an act of Parliament—is very strong to show that the intention of the Legislature was that a different construction should be put upon the words used in this case on the subject-matter to be provided for. Those acts of Parliament in which various words are used, some of them for sanitary purposes, and others for local government purposes, may be sufficiently clear for all purposes intended to be accomplished by them. But the object of this act is for the first time to pave a street which has been formed by houses built on either side, or both sides; and I cannot help thinking that, for such a purpose, it is reasonable and just it should not be confined simply to those who are actually frontagers. In one sense it is true a portion of this property is frontage property, because, whatever the number of feet may be by which the access is given which is the private property of the school board, that is really a frontage. I am quite satisfied that where a building derives its access and the whole benefit of the access from a street newly formed and [76] laid out, it would not be *giving full effect to the words "forming the street" if we gave it any other sense than that which we now do.

I was struck with the hardship,—and that may be a question for the consideration of the vestry,—that would arise supposing a change of circumstances were to take place, and there was a new access from a street at the back and at the side. I think the possibility of that change of circum-

(1) 1 Ex., 319; 17 L. J. (Ex.), 63.

stances might well be considered in the way in which the vestry should assess these premises. I think those are considerations which they might well take into account.

But upon the whole of the circumstances, I have come to the conclusion, which is satisfactory to my own mind, that this is the true meaning of the act of Parliament, and that the rate is properly made.

QUAIN, J.: I am of the same opinion. I think Mr. Marriott admitted that unless he could distinguish this case from it, *Baddeley v. Gingell* (1) is almost decisive of the case, although not a binding authority upon us. The whole argument, as I understand Sir Henry James and Mr. Marriott, went merely on the words "forming the street;" they say that this school-house does not form any part of the street at all, construing those words as if they were "forming the line of the street." But the words are not "forming the line of the street;" the words are merely "owners of houses forming the street," that is, constituting the street in the ordinary sense of the word. And people might well be said to live in the street, although not fronting that street, if their sole access was from that street. I think the question of sole access from the street is the governing idea, whether we should say it is within the street or not. And this being a private access and a private passage from the street, it seems to me, as was suggested by the Lord Chief Justice, to be the same thing as if they enlarged their house and brought their front door to the street, although the largest portion of the house was behind and not immediately fronting the street.

For these reasons, therefore, I think, substantially, and looking at the object of the act of Parliament, that people who get the *benefit from the paving should contribute. [77 The board get a material benefit, because they use that street for their sole access. I think substantially, and looking at the words of the statute, we ought to give a wide construction to the words, and therefore uphold this rate.

Judgment for the respondents.

Solicitors for appellants: *Gedge, Kirby & Millett.*

Solicitor for respondents: *John Layton.*

(1) 1 Ex., 819; 17 L. J. (Ex.), 83.

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Smith v. Cook.

[Law Reports, 1 Queen's Bench Division, 79.]

Dec. 14, 1875.

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*SMITH V. COOK.

Agistment—Placing Horse among Horned Cattle—Horse gored by Bull—Defect of Fences—Liability of Agister—Absence of Scienter.

The defendant, an agister of cattle, placed the plaintiff's horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field, and that there was no sufficient fence to keep it out. He did not, however, know that the bull was of a mischievous disposition. The horse was gored by the bull and killed, and in an action against the defendant for breach of contract to take reasonable care, the jury found for the plaintiff:

Held, that the fact that the defendant had no knowledge of the mischievous disposition of the particular bull was no ground for disturbing the verdict, as such knowledge was not essential to his liability under his contract as an agister to take reasonable care of the plaintiff's horse.

DECLARATION that the plaintiff delivered a horse to the defendant to be agisted, kept, and taken care of; that the defendant for reward promised to take care of it, but that he took such bad care of it that it was killed.

The pleas denied the promise and the breach. Joinder of issue.

At the trial before Blackburn, J., at the London sittings after Hilary Term, 1875, it appeared that the plaintiff, a farmer, had been in the habit of sending horses to be agisted on marsh land at Plumstead, Woolwich, in the defendant's occupation. In June, 1874, the plaintiff sent two horses, one a colt, to the defendant's premises. The colt was placed in a field of twelve or thirteen acres with several heifers, and on the 19th of July was found dead, having been to all appearance gored by a bull. There was a bull on land adjoining the defendant's marsh, and separated from it by a shallow ditch. The defendant knew that the bull had been several times found on his land, the ditch not being sufficient to keep it out, but there was no evidence that the bull was of a mischievous disposition. Witnesses were called by the plaintiff, who stated that it was imprudent to turn young horses among horned cattle; and witnesses for the defendant stated that it was usual to do so upon marsh land, and that there was no danger in such a practice.

The learned judge left to the jury the questions whether the colt was killed by the bull, and whether the defendant 80] acted *without reasonable and proper care in putting the colt in the field near the bull and with the heifers.

The jury found for the plaintiff, damages £50, leave

being reserved to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained accordingly, on the ground that there was no evidence of scienter, and that such evidence was necessary to maintain the action, or for a new trial on the ground that the verdict was against the weight of evidence.

Bray (Murphy, Q.C., with him), showed cause: The plaintiff is entitled to retain the verdict. Proof of the scienter is unnecessary. The action is not founded upon any breach of duty on the part of the defendant as the owner of a mischievous animal; the relation between the plaintiff and him was that of bailor and bailee, and the action is founded on contract. The defendant's contract is to take reasonable care; he measures the risk from various quarters, including that from ferocious animals, and fixes his remuneration accordingly. There may be reasons why duties as between neighbors should not be too onerous; but where the relation is one of contract no such reasons exist. Again, it may be too much to presume that an ordinary bull will attack human beings, but in the present case it was natural and probable that the bull should attack the horse whilst it was among the heifers. The owner of horses is liable for the ordinary consequences of their trespassing, even where they injure other horses: *Lee v. Riley* ⁽¹⁾; *Ellis v. Loftus Iron Co.* ⁽²⁾. The propensity of a bull to attack horses under circumstances like the present is not necessarily a vice. In the American case of *Dolph v. Ferris* ⁽³⁾ it was held that if a bull break into an inclosure and gore a horse, the owner of the bull is liable, and in the judgment of the court, Kennedy, J., after reviewing the authorities, says: "Indeed, I am not satisfied that every owner of a bull is not bound to keep him confined, so that he shall not run at large or trespass upon the lands of others. The propensity of this animal to rove, and to break into the inclosures of others, especially where cows may be feeding, is notorious; and that when thus suffered to rove about, *it is also notorious that it happens only [8] too frequently that he will attack horses with his horns if they come in his way, and as sure as he does they seldom escape death or serious injury.*"

[BLACKBURN, J.: Those observations certainly go to show that the verdict was not against the weight of evidence.]

⁽¹⁾ 18 C. B. (N.S.), 722; 34 L.J. (C.P.), 212.

⁽²⁾ Law Rep., 10 C. P., 10.

⁽³⁾ 7 W. & Serg. (Pennsylvania), 367.

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In another American case, *Barnes v. Chapin* (*), where a colt was kicked and killed by a mare which had been turned loose on the highway without a keeper, it was held that the owner of the mare was liable, though it was not vicious. The law as to mischievous animals cannot interfere with freedom of contract.

J. J. Powell, Q.C., and *Shaw*, in support of the rule: The defendant is not liable. It has always been held that there is no breach of duty in not guarding others against the violence of cattle or other beasts which are not known to be of a fierce disposition. Where the action is founded on contract, proof of knowledge or want of knowledge is equally essential. In a very early case, *Buxendin v. Sharp* (*), where the plaintiff declared that the defendant kept a bull that used to run at men, but did not say *sciens*, or *scienter*, the declaration was held bad after verdict. And recently, in *Cox v. Burbidge* (*), where a horse straying on a highway kicked a child, the owner was held not liable unless he knew that the horse was of a vicious temper. The case of *Lee v. Riley* (*) was an action of trespass, but here the defendant has been guilty of nothing in the nature of a trespass. The defendant did not insure the safety of the horse, the liability of an agister is simply to take care of the animals intrusted to him: *Corbett v. Packington* (*).

BLACKBURN, J.: I think that in this case the rule must be discharged. The defendant is sued as an agister of horses, and although such an agister does not insure the safety of the horses intrusted to him, he is bound to take reasonable care of them, and if they are killed through his negligence, he is liable. At the trial it was proved that he [82] received a young horse from the plaintiff, *and put it into a field of twelve or thirteen acres with a number of heifers, well knowing that a bull in the adjoining land was in the habit of visiting these heifers, and that there was nothing to keep him out of the field. It seems clear that this bull, either because the horse happened to come between him and the heifers, or for some other reason, attacked and killed it. The first question is whether there was evidence of negligence on the part of the defendant. Now, a large body of witnesses, comprising people acquainted with marsh land, said that in their opinion it was

(*) 4 Allen, 444.

(*) 2 Salk., 662.

(*) 18 C. B. (N.S.), 430; 32 L. J. (C.P.),

(*) 18 C. B. (N.S.), 722; 34 L. J. (C.P.),

212.

(*) 6 B. & C., 268.

imprudent to turn young horses among horned cattle; and there was counter evidence for the defendant. One of his witnesses, indeed, stated that a horse was sometimes put into a field with twenty or thirty bulls and heifers, but I think he rather injured his own side. It is impossible to lay down a rule for every case. The jury must be taken to have found that there was negligence, and I am not prepared to quarrel with their finding, as I should probably have come to the same conclusion myself.

Then the second question relates to the law (settled by authority rather than by reason), that although the owner of an animal, such as a cow, which he allows to roam about, is responsible for damage caused by its trespassing, yet that in the case of animals not of mischievous nature, he is entitled to suppose that they will not injure any one until he has had actual knowledge to bring him to a contrary opinion. Knowledge of the fierceness of the animal, called in pleading the *scienter*, was long ago held to be necessary. There is a case in Dyer's Rep., 25, pl. 162, where it was so held, and in the margin of that case there are references to earlier authorities in the Year Books, and to the Book of Exodus, c. xxi., v. 29. I suppose that this law was suited to the convenience of earlier times, when cattle were left to wander about on open commons, and it was thought that the mere fact that bulls sometimes toss people was not by itself enough to make their owners liable for their acts. The question is: Does this principle oblige us to hold as a matter of law that it cannot be negligence on the part of an agister of horses to assume that bulls and cows are likely to be quiet, and to put a horse among them? I think that this proposition is a *non sequitur* upon the law as to mischievous animals. I do not say that *the [83 defendant's act would in all cases necessarily be negligence, but it is a question of fact whether he took sufficient care or not, and the doctrine of *scienter*, which, as I have said, depends mainly upon authority, ought not to be extended to a contract to take reasonable care. The cases which have been cited to us do not throw much light on the subject. *Lee v. Riley* (1) is the nearest to the present case, but there there was no question of negligence, the injury was the natural consequence of allowing the animal to be at large. It might be argued from that case and from *Dolph v. Ferris* (2), which had been cited, that the owner of a bull who allowed it to escape would be liable if it attacked a

(1) 18 C. B. (N.S.), 722; 34 L. J. (C.P.), (2) 7 W. & Serg. (Pennsylvania), 367. 212.

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horse, and *a fortiori* he would be liable if he put the horse in a field with the bull, and this is very much what the defendant did.

QUAIN, J.: I am of the same opinion. I quite agree that this action is founded on negligence, on a breach of the contract by the agister to take proper care, and the question is whether he did take proper care or was guilty of negligence. Mr. Powell argues that there could be no negligence unless the defendant knew that the bull was a mischievous animal, and endeavors to bring the facts before us within the class of cases relating to mischievous animals. But the question in the present case is different. In *May v. Burdett* ⁽¹⁾ Lord Denman sums up the authorities which relate to mischievous animals, saying, "The conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed without express averment." And the Court of Exchequer in *Jackson v. Smithson* ⁽²⁾, gave immediately afterwards a decision to the same effect, that the cause of action for keeping a mischievous animal was not founded on negligence, which need not be averred. The liability of the owner of a mischievous animal being therefore unconnected with negligence, there is no authority for importing the law relating 84] to this liability into an action which is founded *upon negligence. The case might have been stronger if the defendant had known that the bull was mischievous, but the evidence of negligence was quite sufficient.

FIELD, J.: I am of the same opinion. As regards the evidence the verdict of the jury is quite satisfactory, and the only remaining question is whether the fact that the defendant did not know that the bull was accustomed to attack horses entitled him to have the verdict entered in his favor. The authorities establish that the owner of tame beasts is not answerable, without proof of the scienter, for injuries which they inflict on the person of others; but the present action is founded on the bailment of a horse, from which a contract to take reasonable care of it is implied. Now, the defendant put this horse in a field knowing that within range of the field there was a bull, and that within the field there were heifers, and knowing that the bull would naturally come into the field, and was in fact in the habit of so coming. He says, I did not know that the bull would attack a horse. But all that it is necessary for the

⁽¹⁾ 9 Q. B., 101, 112; 16 L. J. (Q. B.), 64. ⁽²⁾ 15 M. & W., 563.

plaintiff to make out is some want of reasonable care, and this I think he succeeded in doing. The rule must be discharged.

Rule discharged.

Solicitors for plaintiff: *May, Sykes & Batten.*

Solicitor for defendant: *S. W. Johnson.*

See *Sargent v. Slack*, 47 Vt., 674, 19 Am. Rep., 136.

[Law Reports, 1 Queen's Bench Division, 84.]

Nov. 20, 1875.

BOSLEY, Appellant; DAVIES, Respondent.

Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17—"Suffering Gaming" on Licensed Premises—Proof of Knowledge on the Part of Innkeeper.

In order to support a conviction under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17,—by which if any person licensed under the act "suffers any gaming or any unlawful game to be carried on on his premises" he is made liable to certain penalties,—it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that gaming was carried on on his premises.

At the hearing of an information against the appellant, an hotel keeper, for suffering gaming on his licensed premises, it was proved that a police constable, about half-past twelve in the morning, was in the street in which the premises were situate. Two of the windows had the blinds up, so that the constable could see [85] three gentlemen, and from what they said it was evident that they were playing cards. He waited for about a quarter of an hour, when the front door was opened by one of the waiters, and he then entered and went up stairs to the room, and found six gentlemen round a table with a quantity of money on it. The manageress of the hotel said that she did not know that they were playing cards, and that they did not have the cards of her, and her statement was confirmed by the card-players, who were in a private room. The appellant having been convicted:

Held, that the case must be sent back to the justices with an intimation of the opinion of the court that, though actual knowledge on the part of the appellant or his servants, in the sense of seeing or knowing of, the card playing, was not necessary to be shown, yet that some circumstances must be proved from which it could be inferred that they connived at what was going on.

CASE stated by justices of Hereford under 20 & 21 Vict. c. 43.

An information,—preferred by the respondent, superintendent of police for Hereford, against the appellant, a person duly licensed for the sale of intoxicating liquors by retail, under the Licensing Acts, 1872, 1874, as the managing director of the Green Dragon Hotel Company, Hereford, under s. 17 of the Licensing Act, 1872, charging that he on the 1st of July, 1875, being a person duly licensed for the sale of intoxicating liquors by retail, did unlawfully suffer gaming on his licensed premises,—was heard, and the appellant convicted and adjudged to pay a penalty of £1, and 10s. 6d. costs, or in default of payment to be imprisoned for fourteen days.

Upon the hearing it was proved on the part of the respondent that George Barroll, a police constable, about half-past twelve in the morning of the 1st of July, was on duty in Broad Street, Hereford, in which street the appellants licensed premises, called the Green Dragon Hotel, are situate, and heard laughing and shouting proceeding from the Green Dragon Hotel. He then went opposite the Green Dragon, and heard noises and voices in a room with three windows facing the street. Two of the windows had the blinds up a part of the way, so that the constable saw three of the gentlemen who faced the street, and from what he heard, knew that there were several gentlemen playing at cards. He waited about a quarter of an hour, when the front door was opened by one of the waiters, who came out, and the constable entered and went up stairs direct into the room where the gentlemen were, and he there found six 86] gentlemen round a table *playing at cards, with a lot of money on the table, and also drink. He asked them for their names; some of them refused, but at length they all gave their names. When the constable came down stairs he met Miss Clarke, the manageress, who, he stated, was angry with him, and told him he had no right to go up stairs without first coming to her, and took his number and said she should report him. She said she did not know they were playing at cards, and that they did not have the cards of her. The constable said they were making a great noise, and it could be distinctly heard in the street that they were playing at cards.

The appellant's attorney admitted that the gentlemen were playing at cards, and that they were playing for money, but contended that it was necessary that the gaming should be carried on with the knowledge of the appellant or the manageress, or other persons employed in the hotel, and quoted the case of *Avards v. Dance* (1). The respondent, however, drew the attention of the justices to the circumstance that the 17th section of the Licensing Act, 1872 (2), did not contain the word "knowingly," as did the repealed statute (9 Geo. 4, c. 61, s. 21, schedule (C)), and as

(1) 26 J. P., 437.

(2) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17, if any person licensed under the act "suffers any gaming or any unlawful game to be carried on on his premises," he is made liable to a penalty not exceeding for the first offence £10, and for the second and any subsequent offence £20.

The form of innkeeper's license given by 9 Geo. 4, c. 61, schedule (C), contains the proviso *inter alia* that he do not knowingly suffer any unlawful games or any gaming whatsoever in his house or premises.

do some of the sections of the present statute with reference to other offences.

The appellant's attorney afterwards called in defence two witnesses; first, Mr. B. T. Featherstone of Harwick, one of the gentlemen in question, who stated that he and the other gentlemen were staying at the Green Dragon Hotel, having come to Hereford for a game of cricket, and they had a private room and dined there that evening; that cards were produced by a Mr. Walker, one of the gentlemen, and that they played for money, and that he did not think that anybody in the house knew they were playing at cards; but in cross-examination he said as follows: "I did not see the waiter come in. We had all our drinkables. He came in just *after the police constable came in. I fancy it was [87 a short waiter. I don't recollect that any brandies were brought in. Just before we commenced playing our brandies and sodas came in." Secondly, Miss Elizabeth Clarke, the manageress, was called, and proved that she did not supply the cards, and that she had no knowledge of the card-playing until she saw the policeman.

No waiter was called, nor the gentleman who produced the cards, nor any other person who might have had access to the room, and on the above facts the justices convicted the appellant.

The question was, whether under the 17th section of the Licensing Act, 1872, it was incumbent on the part of the respondent to prove actual knowledge on the part of the appellant, or some authority of the hotel, of the fact of gaming, so as to render the appellant liable under that section.

If the court should be of opinion that proof of such knowledge was necessary, then the information was to be dismissed.

Poland, for the appellant. Under s. 17 it is necessary to support a conviction that there should be actual knowledge on the part of the innkeeper that gaming is being carried on on his premises. How can he be said to suffer a thing of which he is ignorant? No doubt there are matters where ignorance is no excuse; for example, the fact that the house is kept open within prohibited hours.

[COCKBURN, C.J.: A man may be said to "suffer" a thing to be done, if it is done through his negligence.]

There is no evidence that the waiter, or any one employed in the hotel, knew of the card-playing. The case of *Avards v. Dance* (1),—where a landlord was convicted for allowing

(1) 26 J. P., 437.

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gaming, contrary to the terms of his license, which contained the proviso that he should not knowingly suffer any gaming on his premises,—is an authority to show that under a similar provision knowledge on the part of the person charged is material. The omission of the word “knowingly” in s. 17 is immaterial, and was probably unintentional.

Sawyer, for the respondent: A conviction is good under this section without proof of knowledge on the part of the [88] landlord. *He can only discharge himself by proving that he has taken every reasonable precaution to prevent gaming on his premises. The case of *Mullins v. Collins* (¹) is an authority to show that the landlord is liable under s. 16 if his servant knowingly supplies liquor to a constable on duty without the authority of his superior officer. The question whether the publican could be convicted if the servant had no knowledge that the constable was on duty is left open by Blackburn, J. The object of the statute was to prevent gaming from being carried on in licensed premises: *Reg. v. Ashton* (²). This is not a case in which the *mens rea* is material: *Fitzpatrick v. Kelly* (³). The word “knowingly” was, in s. 17, intentionally omitted by the Legislature.

Poland, in reply: *Fitzpatrick v. Kelly* (³) has no bearing on this case. In that case there was a legal obligation to supply unadulterated butter, and the scienter was immaterial. Here the duty is only that of taking reasonable precaution.

PER CURIAM (Cockburn, C.J., Mellor and Quain, JJ.): The case must be sent back to the justices with an intimation of the opinion of the court that actual knowledge in the sense of seeing or hearing by the party charged is not necessary, but that there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on. Constructive knowledge will supply the place of actual knowledge.

Case remitted accordingly.

Solicitor for appellant: *Fortune, for Gwillim, Hereford.*

Solicitor for respondent: *G. F. Cooke.*

(¹) Law Rep., 9 Q. B., 292.

(³) Law Rep., 8 Q. B., 337.

(²) 1 E. & B., 286; 22 L. J. (M.C.), 1.

Guilty knowledge may be found from 3 Russell on Crimes, 5th Eng. ed., circumstantial as well as from direct 376; *Parker v. Green*, 2 B. & S., 299, evidence: *Redgate v. Haynes*, 1 Q. B. 110 Eng. Com. L. Rep.; *Regina v. Farrelly*, 89, to appear in 16 Eng. Rep.; 1 Crawf. & Dix. C. C., 22.

C A S E S
DETERMINED BY THE
COMMON PLEAS DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE COMMON PLEAS DIVISION,
XXXIX VICTORIA.

[Law Reports, 1 Common Pleas Division, 19.]

Nov. 2, 1875.

*NUGENT V. SMITH.

[19]

Common Carrier—Liability of a Ship-owner who carries Goods generally for Hire from a Port within to a Port without the Realm—Act of God.

To bring a person within the definition of a "common carrier," he must exercise the business of carrying as a public employment; he must undertake to carry goods for all persons generally; and he must hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire, as a business, not merely as a casual occupation *pro hac vice*.

Every ship-owner or master who carries goods on board his vessel for hire is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God or the Queen's enemies.

It is not only such ship-owners as have made themselves in all senses common carriers who are so liable; but all ship-owners who carry goods for hire,—whether inland, coastwise, or abroad, outward or inward: all are within the exception to the general law of bailments.

Therefore, where the owner of a line of steamers advertised to carry goods from a port within to a port without the realm received goods to be carried for hire upon that voyage, his liability to the ordinary responsibilities of a common carrier according to the custom of the realm was held to attach at whatever period of the voyage a loss might occur.

The defendant, who held himself out as a carrier by sea from London to Aberdeen, received from the plaintiff in London a mare to be carried to Aberdeen for hire. In the course of the voyage,—whether within the limits of the realm or without was left uncertain,—the ship encountered rough weather, and the mare, without any

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negligence on the part of the defendant's servants, but partly by reason of more than ordinary bad weather, and partly by reason of fright and consequent struggling of the mare herself, was injured to such an extent that she died :

Held, that the defendant was liable as an insurer, this not being a loss by the act of God, not because he was a common carrier, but because he carried the plaintiff's mare in his ship for hire.

A damage or loss may be said to have been occasioned by the act of God where it has been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the carrier could not by any amount of ability foresee, or, if he could foresee it would happen, could not by any amount of care and skill resist, so as to prevent its effect.

THIS was an action against the defendant as secretary of a company who advertised a line of steamers to run between London and Aberdeen for the conveyance of passengers and goods, to recover damages for the loss of a mare.

The cause was tried before Brett, J., at the sittings in London after Hilary Term, 1874, when a verdict was entered 20] for the *defendant, leave being reserved to the plaintiff to move to enter the verdict for him upon certain findings of the jury. In the following Easter Term a rule *nisi* was granted, against which cause was shown in Easter Term 1875.

The facts and arguments are fully stated in the judgment.

Holl and Douglas Walker, for the defendant, referred to the following authorities: *Liver Alkali Co. v. Johnson* ('); *Morse v. Slue* ('); the judgment of Lord Holt in *Coggs v. Bernard* ('); Jones on Bailments, 103; Story on Bailments, §§ 489, 523, 900; Angell on Carriers, §§ 149, 150, 151, 154, 155, 158; *Lane v. Cotton* ('); Abbott on Shipping, 8th ed., 345, 382; *Pickering v. Barclay* ('); *Barclay v. y Gana* ('); *Lavaroni v. Drury* ('); M'Lachlan on Shipping, 337; Bacon's Abridgment, Carriers; *Benett v. Peninsular and Oriental Steam Boat Co.* ('); *Crouch v. London and North Western Ry. Co.* ('); *Forward v. Pittard* ('); *Pianciani v. London and South Western Ry. Co.* ('); *Amies v. Stevens* ('); *Trent and Mersey Navigation Co. v. Wood* ('); *Smith v. Shepherd* ('); *Oakley v. Portsmouth and Rhyde Steam Packet Co.* ('); *Colt v. M'Meichen* ('); Parsons on Shipping, ed. 1869, c. 7, p. 253; *Kendall v. London and South Western Ry. Co.* ('); *Blower v. Great Western Ry.*

(') Law Rep., 7 Ex., 267; in error, 9 Ex., 338.

(') 3 Keb., 72, 112, 135; 1 Ventr., 190, 238; 1 Mod., 85; 2 Lev., 69.

(') 2 Ld. Raym., 909; 1 Salk., 26.

(') 1 Ld. Raym., 646, 653.

(') 2 Roll. Abr., 248; Sty., 182.

(') 3 Doug., 389.

(') 8 Ex., 166; 22 L. J. (Ex.), 2.

(') 6 C. B., 775; 18 L. J. (C.P.), 85.

(') 14 C. B., 255; 23 L. J. (C.P.), 73.

(') 1 T. R., 27.

(') 18 C. B., 226.

(') 1 Str., 127.

(') 3 Esp., 127; 4 Doug., 287.

(') Abbott on Shipping, 11th ed., 338.

(') 11 Ex., 618; 25 L. J. (Ex.), 99.

(') Johns. Rep. (N.Y.), 160.

(') Law Rep., 7 Ex., 373.

Co. (') ; Laurie v. Douglas (') ; Notara v. Henderson (') ; Grill v. General Iron Screw Colliery Co. (').

Cohen, Q.C., and Lanyon, for the plaintiff, relied upon the judgment of the Court of Queen's Bench in Lloyd v. Guibert (').

Cur. adv. vult.

*Nov. 2. The judgment of the court (Brett and [21 Denman, J.J.,) was delivered by

BRETT, J. In this case, tried before me in London, the plaintiff delivered to the defendant's company in London, a mare to be carried by steamer to Aberdeen. The defendant's company advertised and habitually ran a line of steamers from London to Aberdeen. The mare was shipped without any bill of lading. At a part of the voyage, which was not determined by the evidence, the mare, during rough weather, was injured, and to such an extent that she died. There was a conflict of evidence as to the amount of care and skill exercised by the defendant's servants, and as to the conduct of the mare. The jury were asked,—

1. Was the injury to the mare caused by negligence of the defendant's servants, either in preparing for bad weather or in attempting to save the mare from the consequences of bad weather? Answer, No.

2. Or, was the injury caused solely by the conduct of the mare herself, by reason of fright and consequent struggling, without any negligence of the defendant's servants? Answer, No.

3. Or, was the injury caused solely by the perils of the sea, i.e., by more than ordinary rough weather, without any negligence of the defendant's servants or any fright and consequent struggling of the mare? Answer, No.

4. Or, was it caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants? Answer, Yes. The jury were further asked,—

5. Were there any known means, though not ordinarily used in the carriage of horses by people of ordinary care and skill, by which the defendant could have prevented the injury to the mare? This question the jury did not answer.

Upon the answers of the jury, a verdict, for the purpose of the day, was directed to be entered for the defendant, the

(') Law Rep., 7 C. P., 655.

(') 15 M. & W., 746.

(') Law Rep., 5 Q. B., 346; in error, 7 Q. B., 225.

(') Law Rep., 1 C. P., 600; in error, 3 C. P., 476.

(') Law Rep., 1 Q. B., 115.

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plaintiff having leave to enter a verdict for him on the findings of the jury, if upon such findings the court should be of opinion that he was entitled to judgment.

Upon a rule granted to show cause, it was admitted on behalf of the defendant, that, if the whole voyage had been 22] within the *realm of England, the defendant would have been deemed to be a common carrier according to the custom of the realm, because he advertised to carry any person's goods from place to place: but it was argued that, under the circumstances of the case, he could not be so deemed, because he undertook to carry to a port without the realm; and therefore a part of the voyage was beyond the realm, and could not be subject to the custom of the realm.

It was then argued that it was consistent with the evidence that the injury was caused outside the realm, and therefore that the liability in respect of such injury could not be regulated by the custom of the realm. It was also contended that, the peril of the sea which caused the injury, being the result of more than ordinary bad weather, that is to say, of weather not to be expected in an ordinary voyage, was, if the case was to be decided upon a carrier's liability according to the custom of the realm, the act of God within the meaning of that exception to a carrier's liability; and, further, that the injury having happened partly through the conduct, from its inherent nature, of the mare, the defendant could not be held responsible.

It was urged for the plaintiff, that the defendant, by advertising that he would carry the goods of any person from place to place, undertook the responsibilities of and became a common carrier according to the custom of the realm of England; that this would be so in the case of any persons so advertising in England, and would be so in the case of any British ship-owner so advertising anywhere; that the circumstance of one of the termini of the proposed voyage being outside the realm did not alter the liabilities; that, even if the defendant was not a common carrier, yet he was a ship-owner carrying goods on board ship, as matter of trade, for hire, and ship-owners so carrying goods are, by the custom of the realm, responsible as insurers for the safety of the goods to the same extent as common carriers are responsible; that the perils of the sea which caused the injury in this case were not the act of God within the meaning of the exception to the complete liability of a common carrier or a carrier by ship of goods for hire, for that an injury can only be said, within the meaning of that exception,

to have been occasioned by the act of God, when *it has [23 been occasioned directly and not indirectly by the extraordinary action of some physical force the consequences of which could not be averted, or by some unexpected and extraordinary natural occurrence which human foresight could not foresee nor human power resist or prevent, whereas there was in the present case a sea more rough indeed than on an ordinary voyage, that is to say, a peril of the sea, but nothing more; that the natural fright of the mare caused by the more than ordinary rough weather was not an inherent vice of the mare which could absolve the defendant from liability for the injury to the mare.

This case was elaborately argued before my Brother Denman and myself. The main question treated was, the principle on which the liability of the defendant, if any, ought to rest. It was urged on behalf of the defendant that his liability cannot be made to rest on an allegation that he was a common carrier, because, it was said, that liability is imposed by a custom of the realm, and such a custom cannot have force beyond the realm, and the defendant has a right to assume in the present case that the injury to the mare happened beyond the realm.

But, the phrase "by the custom of the realm" is in truth only a paraphrase for "by the common law." Thus, in Selwyn's *Nisi Prius*, tit. Carriers, c. 10, it is said: "And by 'the custom of the realm,' that is, by 'the common law,' &c." And Story on Bailments, § 469: "The general principles of the Roman and foreign law upon the subject have been stated somewhat more at large, because they form a proper introduction to the doctrine of *the common law* upon the subject, in which the responsibility of innkeepers is said to be founded on *the custom of the realm*, because in point of fact the origin of the latter may be clearly traced up to the Roman law, from which *the common law*, without any adequate acknowledgment, has from time to time borrowed many of the important principles which regulate the subject of contracts." And, in *Forward v. Pittard* (1), Lord Mansfield says: "But there is a further degree of responsibility 'by the custom of the realm,' that is, 'by the common law.'" In *Crouch v. London and North Western Ry. Co.* (2), Jervis, C.J., says: "When a party who holds himself out as a common carrier accepts goods, 'the common law,' that is, *the law founded on the custom of the realm,' in- [24 grafts upon such acceptance a contract to carry safely and to insure, subject only to two exceptions, viz., the act of God

(1) T. R., 27.

(2) 14 C. B., 255; 23 L. J. (C.P.), 73.

and the Queen's enemies." The question, therefore, is one of contract, and depending upon the nature of the undertaking to be implied by the common law of England. The contract is obviously made at the time of the receipt of the goods for carriage. If that receipt be in England, on board an English ship, the whole contract must be construed according to English law. If it be abroad by an English master on board an English ship, it is still an English contract, because it is a contract made under the English flag: *Lloyd v. Guibert* (¹): and therefore in that case also the question is, what is the undertaking to be implied on the part of the ship-owner by the common law of England. The question being one of contract, there is no principle of law which forbids the implication of a promise to carry safely beyond as well as within the realm. The reason of the implied promise, given by Lord Holt in *Coggs v. Bernard* (²), and by Best, C. J., in *Riley v. Horne* (³), founded on the reason on which the Prætor allowed the exceptional liability of shipmasters, innkeepers, &c., applies at least quite as strongly to the part of the carriage by sea beyond the realm as to the part within it. There is no ground on which to imply a different extent of undertaking in the same contract for the carriage which is beyond the realm from that which is within it. On principle, therefore, the same promise should be implied for the whole carriage, whether the whole be within the realm or part be within and part without. *Morse v. Slue* (⁴) has always been treated as a decision that the same promise is implied where the ship is to go beyond sea as where she is always within the realm. And so has *Goff v. Clinkard*, quoted in *Dale v. Hall* (⁵). *Crouch v. London and North Western Ry. Co.* (⁶) is precise to the same effect. And Kent, C. J., in *Elliott v. Russell* (⁷), lays it down in the strongest terms, that "Masters and owners of vessels are liable as common carriers on the high seas as well as in port; and the argument of the ingenious counsel 25] *for the defendant is not well supported in the position that the doctrine of common carriers is by the common law of England to be confined to cases of transportation by water within the jurisdiction of the realm. All the books and all the cases which touch this subject lay down the rule generally, and apply it as well to shipments to or from a foreign port as to internal commerce." "If the master be

(¹) Law Rep., 1 Q. B., 115.

(²) Ld. Raym., 909; 1 Salk., 26.

(³) 5 Bing., 217.

(⁴) 2 Lev., 69; 1 Vent., 190, 238; 1 Mod., 85; 3 Keb., 72, 112, 135.

(⁵) 1 Wils., 281.

(⁶) 14 C. B., 265; 23 L. J. (C.P.), 73.

(⁷) 10 Johns. Rep. (N.Y.), 1, 7.

chargeable as a common carrier for goods received to be transported beyond sea, it would seem to be very extraordinary and idle for the law to regard him in that character only from the time that the goods were received on board until he had put to sea, and to regard him, when coming from abroad, as common carrier only from the time that he entered within the jurisdiction of the port. There is no color of such a limitation of the rule."

It seems to us that there is no answer to this reasoning. In all these cases the undertaking or promise is treated as one and indivisible. And we are of opinion that, whether the promise is to be implied only in ships which are held out as common carriers or in all ships which carry goods for hire, the promise or undertaking to be implied is, both on principle and authority, one and indivisible, and applies precisely to the same extent to a loss occurring in the part of the voyage beyond the realm as to one occurring in the part within the realm. If, therefore, it is right to say that the liability of insurance attaches to a ship-owner because he holds himself out to be a common carrier, the defendant, who did so hold himself out, was subject to the ordinary liability of common carriers, and could not, in the absence of any other defence, absolve himself on the ground that he may assume that the mare was injured beyond the realm. That some ship-owners so conduct their business as to be within the definition of common carriers, and to be properly so treated in every respect, is clear. It was so stated in *Morse v. Slue* (*) and in *Coggs v. Bernard* (*), and has been in a multitude of other cases. A general ship is, by the mere fact of her being so put up, made in all respects a common carrier, though she is going to a foreign port: *Barclay v. y Gana* (*); **Lavaroni v. Drury* (*). It would be [26 sufficient, therefore, in the present case to say that the defendant was a common carrier, and therefore at all events subject to the liabilities of common carriers according to the common law.

But it was argued strongly that this is not the real ground of the liability in the case of ship-owners; that some ship-owners who carry goods for hire are not common carriers, and yet are, in the absence of express contract, liable to the same extent as common carriers; that, in fact, all ship-owners who carry goods for hire, whether they be common carriers or not, are in the absence of express con-

(1) 2 Lev., 69; 1 Vent., 190, 238; 1 Mod., 85; 3 Keb., 72, 112, 135.

(2) 2 Ld. Raym., 909; 1 Salk., 26.

(3) 3 Doug., 389.

(4) 8 Ex., 166; 22 L. J. (Ex.), 2.

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tract made liable by implication by the common law to insure the safe carriage and delivery of the goods intrusted to them, except against the act of God, or the Queen's enemies; that the true ground of such liability in the case of ship-owners is not that they are common carriers, but that they are ship-owners carrying goods for hire.

It is not absolutely necessary, as we have pointed out, to determine this question in this case. But it is obviously one of great importance; and, as it was made a main point of argument, and was most ably argued, we think it right to give our judgment on it.

In order to determine whether there may not be some ship-owners who carry goods for hire, and who nevertheless are not common carriers, we should determine exactly what it is that makes a man a common carrier. "It is not every person who undertakes to carry goods for hire that is deemed a common carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of an ordinary bailee for hire, that is to say, the responsibility of ordinary diligence. To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*. A common carrier has therefore been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place:" 27] Story, § 495. In **Fish v. Chapman* (1) it is held, in what we venture to call a powerful and business-like judgment, that is, well applying the principles of law to the business of the country, that, "to constitute a man a common carrier, the business of carrying must be habitual, and not casual. The undertaking must be general, and for all people indifferently. He must assume to be the servant of the public; he must undertake for all people." "When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships or for the transportation of merchandise for persons in general, such as vessels employed in the coasting-trade, or in general freighting business for all persons offering goods on freight for the port of destination:" Story, § 501.

The real test of whether a man is a common carrier, whether by land or water, therefore, really is, whether he

(1) 2 Kelly's (Georgia) Rep., 349.

has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried. If he does this, his first responsibility naturally is, that he is bound, by a promise implied by law, to receive and carry for a reasonable price the goods sent to him upon such an invitation. This responsibility is not one adopted from the Roman law on grounds of policy: it arises according to the general principles which govern all implied promises. And his second responsibility, which arises upon reasons of policy, is, that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy, it would be without reason; many other persons hold themselves out to act in their trade or business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers, because, when the common law *adopted that policy, the business of common car- [28 riers in England was exercised in a particular manner and subject to particular conditions which called for the adoption of that policy. The question is, whether the policy has not been applied, not only to ship-owners who are by their own act common carriers, but also to ship-owners who are not common carriers. Whether a ship-owner is or is not a common carrier must surely, upon principle, as from the cases and writings just quoted it appears to be on authority, depend upon whether the ship-owner holds himself out to carry for hire for all persons who may offer. But certainly many ship-owners do not in fact do so. A ship-owner who puts his ship into a broker's hands to procure a charter does not hold himself out to carry for the first person who offers. Neither does a master who in a foreign port advertises that he is ready to enter into charters. The ship-owner or master has a right to consider the credit and responsibility of the proposed charterer, and to reject his proposal if it be thought expedient. One who puts up his ship as a general ship does, by so doing, by the ordinary understanding of ship-owners and merchants, hold himself out as ready to carry all reasonable goods brought to him.

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And so does a ship-owner who runs a line of ships from ports to ports, habitually carrying all goods brought to him. It is admitted, therefore, that such are common carriers, and liable to all the implied undertakings of common carriers. The question is, whether other ship-owners carrying goods for hire without express stipulation, though they are not liable to all the implied undertakings of common carriers, are not by the common law, for reasons of policy, made also liable to one of those implied undertakings.

The solution of this question will, we think, depend upon a consideration of the time at which and the reason for which the liability in question was introduced into the common law. No one who has read the treatise of Mr. Justice Story on Bailments, the essay of Sir William Jones, and the judgment of Lord Holt in *Coggs v. Bernard* (¹), can doubt that the common law of England as to bailments is founded upon, though it has not exactly adopted, the Roman law. It is true that Lord Holt rests as for authority solely on 29] Bracton: but the treatise of Bracton adopts *all the divisions of the Roman law in the very words of the Roman text, and further adopts the exception of the Roman law and the Roman reasons for it. The divisions may be the logical divisions of the subject, and so be naturally adopted by all in every country who treat the subject logically: but the exception, both in the Roman Empire and in England, was no natural exception, but one depending entirely on public policy, arising from the manner in which some particular kinds of business were carried on in both places. It is obvious, therefore, that Bracton, or English judges before him, adopted into the English the Roman law.

By the primary divisions of the law of bailment in the Roman law and as enunciated by Lord Holt, those who carry goods for hire are, unless they are within the exception alluded to, liable only as other bailees for hire, that is to say, they are bound to ordinary diligence and to a reasonable exercise of skill, and, of course, are not responsible for any losses not occasioned by the ordinary negligence of themselves or their servants,—Story, § 457: but those who are within the exception are liable as insurers, &c.

The question, therefore, is, what ship-owners are brought within the exception. That exception was in the Roman law contained in the well-known edict of the Prætor; and the reason for its promulgation was contained in the Commentary of Ulpian: “Ait Prætor, nautæ, caupones, stabu-

(¹) 2 Ld. Raym., 909; 1 Salk., 26.

larii ('), &c.,"—that is to say, ship-masters and the class of persons who carried on the business of innkeepers. If the proposition contained in the exceptional edict is to be considered as adopted straight and in terms into the common law, it is not some ship-masters, but all ship-masters, who are by the terms of it made liable to the greater liability. Carriers, it will be observed, are not mentioned; and certainly not a limited *class of carriers called afterwards [30 "common carriers." "The Roman edict," says Story, "it will be at once perceived, does not extend in terms to carriers by land. But in most, if not in all modern countries, the rule which it prescribes has been practically expounded so as to include them:" § 458.

It required, of course, authority, customary and thence judicial, or parliamentary, to introduce into the common law the original rules and the exception as applicable to *any* case. But, if the exception was to be introduced at all, to what would it naturally be at first applied? It would seem that naturally it would first be applied to the trades or businesses which were carried on in England under the same names and conditions as formerly in the Roman Empire. Modern innkeepers probably carry on the same business as both the stabularii and caupones did in the older time. The two trades, therefore, carried on in England under the same conditions as the three enumerated in the edict, were the ship-masters and innkeepers. The conditions which had induced the Prætor as matter of policy to hold them to a strict liability in Rome were the same conditions as existed in the mode of carrying on the same business in England. The conditions on which the Prætor had acted with regard to ship-masters were not conditions confined to a certain limited portion of ship-masters: those conditions existed in the case of all ship-masters. When, then, the English judges, acting at first no doubt on the general understanding of all merchants and ship-owners, adopted into the common law the exception of the Roman law, there is no reason which can be suggested why they should not and did not adopt it in its terms, as applicable, not to a limited portion of, but to all ship-masters carrying goods for hire. Afterwards, according to the ordinary course of

(1) The word "stabularii" here is evidently used in the second sense given for it in Facciolati and Forcellini's Lexicon (sub verbo), "*Qui mercede homines eorumque jumenta hospitio excipit.*" Passages from Ulpian, Seneca, and Apuleius clearly showing that the word was used

to describe a person almost identical in character with a modern innkeeper, are cited by the authors, who add to the above definition the remark "*nam stabulum tum ad jumenta pertinet, tum ad homines.*" See Bailey's edition, 1828.—Note by Denman, J.

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English law, the judges would have to consider whether some other trade or business was not to be in England introduced into the exception, because such trade was so carried on as to be within the principle of the exception. They found a trade established in England, viz., the trade of "common carriers," which was so carried on, by reason of the state of the country, as to be within the principle or conditions of the exception, and therefore they added that trade to those already within the exception. Common carriers would not be introduced because *they carried the goods of all persons indifferently, but because those who so carried goods at that time were within the mischief dealt with by the Prætor. If this be a true view, ship-masters and ship-owners were not introduced because they were common carriers, but because they were ship-masters and ship-owners, and therefore all ship-masters and ship-owners were comprised in the exception when first it was recognized or introduced by judicial decisions. Common carriers by land were added afterwards, because their business was subject to the same conditions as was the business of all carrying ship-masters and ship-owners.

Many attempts have been made to introduce into the exception other trades, as, those of wharfingers, forwarding agents, carters, &c.; but all such attempts have failed, because those trades, although, in respect of their being public or common trades, they are similar to the trade of common carriers, are not similar to it in those respects in which it was similar to the trades of ship-masters and innkeepers. Unless there is something in the authorities which binds us to determine that only such ship-owners as made themselves common carriers were brought within the exception, reason and consideration seem to us to show that all ship-masters and owners carrying goods for hire were from the beginning brought within it. Innkeepers were probably judicially declared to be within it first in *Calve's Case* ⁽¹⁾. Ship-owners were first judicially declared to be within it in *Morse v. Slue* ⁽²⁾. The facts of that case, as stated in the special verdict in *1 Ventris*, p. 190, lead, one would think, strongly to the conclusion that the ship was a general ship: but, as has been observed by Blackburn, J., in *Liver Alkali Co. v. Johnson* ⁽³⁾, the count is general and states that, "according to the law and custom of England, masters and governors of ships which go

⁽¹⁾ 8 Co. Rep., 32 a.

⁽²⁾ Law Rep., 9 Ex., 341.

⁽³⁾ 2 Lev., 69; 1 Vent., 190, 238; 1 Mod., 85; Keble, 72, 112, 135.

from London beyond sea and take upon them to carry goods beyond sea, are bound to keep safely," &c. This statement is certainly in terms applicable to all ships, and not only to ships acting as common carriers; and therefore the case has generally been considered as a decision upon the liability of all ships. So, in *Dale v. Hall* (¹), the declaration was *not against the defendant as a common carrier, but upon a promise to be implied from the fact of his being a ship-master receiving goods to be carried for hire. So, in *Goff v. Clinkard*, quoted in *Dale v. Hall* (²), there is no statement whatever that the ship was a general ship. We think it worthy of notice that Lord Holt, in the careful judgment in *Coggs v. Bernard* (³), in which his words would be well weighed, speaks thus: "And this is the case of the common carrier, common hoyman, master of a ship," &c. He does not include the ship-master in the class of common carriers. He treats him as a separate and independent class. And, speaking of him, he uses a phrase which includes all ship-masters, and does not confine the class to those ship-masters only who trade as common carriers. Blackburn, J., treats the case of *Lyon v. Mells* (⁴) as a strong authority in favor of the enlarged liability of a barge-owner, without determining whether such barge-owner was a common carrier or not. And the judgment of the majority of the judges in *Liver Alkali Co. v. Johnson* (⁵) seems to be a strong authority in favor of the liability being attached to all ship-masters or owners carrying goods for hire, by reason of their decision that the defendant in that case was liable, without determining whether he was a common carrier or not. In *Barclay v. y Gana* (⁶), it is true that the ship was a general ship: but Lord Mansfield does not decide the case on the ground that the defendant was a common carrier. He says: "It is impossible to distinguish this case from the case of a common carrier." In Bell's Commentaries, c. iv., par. 14, p. 157, it is said: "As to particular ships freighted specially, unless there be a specific agreement, the edict applies." In *Schieffelin v. Harvey* (⁷), it seems impossible to say whether the ship was a general ship. There was a bill of lading; but that does not determine the point. The judgment is, however, general: "The master and owners are responsible for every injury that might have been prevented by human foresight or energy." The judgment of Kent, C.J., in *Elliott v. Russell* (⁸), is also as strong and

(¹) 1 Wils., 281.(²) 1 Wils., 282.(³) Ld. Raym., 909; 1 Salk., 26.(⁴) 5 East, 428.(⁵) Law Rep., 9 C. P., 338.(⁶) 3 Doug., 389.(⁷) 6 Johns. Rep. (N.Y.), 170.(⁸) 10 Johns. Rep. (N.Y.), 1.

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33] general as can be: "In short," he says, "it *must be regarded as a settled point in the English law, that masters and owners of vessels are liable, in port and at sea and abroad, to the whole extent of inland carriers, except so far as they are exempted by the exceptions in the contract of charterparty or bill of lading, or by statute." Certainly, these are terms which seem to show that, in the mind of the Chief Justice, all masters of all sea-going vessels were so liable, and not only those who had made themselves common carriers, and thereby liable to carry the goods of all persons. And it seems impossible to account for the almost universal use of bills of lading by all sea-going ships, if a great number of them, viz., all who were not common carriers, would only be answerable for negligence, for which they are answerable notwithstanding the bill of lading. The exceptions in a bill of lading are exceptions out of a generally recognized absolute liability which it is generally considered *would* exist if those exceptions were not inserted.

We are, therefore, of opinion that the true rule is, that every ship-owner or master who carries goods on board his vessel for hire, is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God, or the Queen's enemies. It is not only such ship-owners as have made themselves in all senses common carriers who are so liable; but all ship-owners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward. They are all within the exception to the general law of bailments, which (as before observed) was adopted into the common law from the Roman law. The liability of the defendant, therefore, was that of an insurer, except against the act of God and the Queen's enemies; not because he was a common carrier, but because he carried the plaintiff's mare in his ship for hire.

We should take notice that our view differs from some few passages in Story, as in § 501, and in § 504. But the note to § 501 seems to intimate a doubt, after all, whether the section is correct; and the cases quoted in support of § 504 do not affect the question now before us.

We have next to determine whether the loss in this case 34] can be *said to have occurred "by the act of God." Many definitions of this phrase have been attempted. Many cases have decided what occurrences cannot in law be considered to come within it. The matter is fully treated in

Story, § 511, and the notes to it; and in Angell on Carriers, §§ 154, 155, and subsequent sections. The definition to be extracted from all the cases is said to be best given in a note on *Coggs v. Bernard* (¹), in the American edition (by Mr. Wallace) of Smith's Leading Cases. The best form of the definition seems to us to be, that the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of ability foresee would happen, or, if he could foresee that it would happen, could not by any amount of care and skill resist, so as to prevent its effect. It lies upon the defendant to show that a damage or loss for which he would otherwise be liable is brought within this exception.

We cannot say, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him, so as to bring himself clearly within the definition. It seems to us impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred.

We think also that the fright of the mare was a natural and probable result of the rough sea,—a fright likely to happen in the case of any ordinary horse,—and cannot be considered such a vice in the inherent nature of this particular mare as to absolve the defendant.

We are therefore of opinion that the plaintiff was entitled to succeed, and that the rule must be made absolute to enter the verdict for him.

Rule absolute.

Solicitors for plaintiff: *Lawrence, Plews & Boyer.*

Solicitors for defendant: *Lyne & Holman.*

(¹) 2 Ld. Raym., 909; 1 Salk, 26.

As to how far a carrier is liable for an injury to animals arising from their own propensities, see *Great Western, etc., v. Blower*, 2 Eng. Rep., 700, 704 note; *Sher. & Redf. Neg.*, tit. "Animals," *Whart. on Neg.*, §§ 615-621, 565, 597.

An action against a railroad company to recover for injuries done by one of the plaintiff's pair of horses to his

mate, while being carried by the defendants, the defendants requested a ruling that if they used due care and provided a suitable car, and the injuries were caused by the peculiar character and propensities of the horses, such as fright or bad temper, they were not liable. The judge refused this ruling, but ruled that if the horse was injured by his mate in an outburst of

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viciousness, quite unusual in horses worked together, the jury might find for defendants. Held, that the defendants had good ground of exception.

A railroad company is not responsible for injuries inflicted by one horse upon another while they were being carried in the company's car, if the injuries were caused by the fault or neglect of the owner of the horses in attaching their halters or not removing their shoes: *Evans v. Fitchburg, etc.*, 111 Mass., 142.

The liability of a carrier of animals is not, in all respects, the same as that of a carrier of inanimate property. But the liability of a railroad company, engaged as a common carrier of animals, is not limited to the careful and safe conveyance of the car containing them.

In the absence of a special agreement, the company is responsible for any injury which can be prevented by foresight, vigilance and care, although arising from the conduct of the animals.

But the carrier is not an insurer against injuries arising from the nature and propensities of the animals, and which diligent care cannot prevent. As to damages arising from other causes, the liability is the same as that of a carrier of other property: *Clarke v. Rochester, etc.*, 14 N. Y., 570.

Plaintiff led his horses, which were gentle, upon a ferry boat, and left them for a moment unattended. The guard chain was not high enough to stop them, and the ferry company had no one to attend them; the horses became frightened by the steam whistle and jumped off the boat. Held, the company was liable, if the jury found, as a fact, that the decks were so slippery that plaintiff could not have stopped the horses if he had been at their heads or on his box, for "it was the duty of the company to have proper and suitable guards and barriers on the boat for the security of the property thus carried, and to prevent damages from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveller": *Short v. Knapp*, 2 Daly, 150, 2 Abb. Pr., N.S., 241; *White v. Wennisemmet Co.*, 7 Cush., 155, 5 Law Reporter, N.S., 203; *Sher. & Redf. Neg.*, § 278 a, *Whart. on Neg.*, §§ 706-8.

See also *Blakeley v. LeDue*, 19 Minn., 187; *Hazman v. Hoboken, etc.*, 50 N. Y., 53, 2 Daly, 130; *Ferris v. Union, etc.*, 36 N. Y., 313; *Lewis v. Smith*, 107 Mass., 534; *Wyckoff v. Queens Co., etc.*, 52 N. Y., 32, disapproving *Fisher v. Clisbee*, 12 Ill., 344; *Powell v. Mills*, 37 Mississippi, 691, and *Wilson v. Hamilton*, 4 Ohio St. Rep., 722.

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Sale of Timber—Interest in Land—Actual Receipt of Part of Goods Sold—Statute of Frauds, ss. 4, 17.

A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the 4th section of the Statute of Frauds.

The defendant by word of mouth purchased certain growing trees for £26 of the plaintiff on the terms that he, the defendant, should remove them as soon as possible. The defendant accordingly cut down some of the trees and agreed to sell the tops and stumps to a third person. The plaintiff then countermanded the sale, and prohibited the defendant from cutting down the rest of the trees. The defendant, however, cut down the remainder, and carried the whole away:

Held, that the case was within the 17th section of the Statute of Frauds, and that before the sale was countermanded there was an acceptance and actual receipt of part of the goods sold within that section.

DECLARATION: 1st count, for trespass to land and cutting down certain trees of the plaintiff; 2d, trover; 3d, for an injury to the plaintiff's reversion.

Pleas: not guilty, not possessed, leave and license, &c., and a special plea setting forth that the plaintiff had sold to the defendant a large quantity of timber trees growing upon the land, with liberty to the defendant to go on to the land to remove the trees, and that the acts complained of were done in pursuance of the agreement, and with the privity and consent of the plaintiff. Issues thereon.

The case was heard before Amphlett, B., at the Leeds Summer Assizes, 1874, without a jury, when the facts were as follows: The plaintiff was the owner in fee of a copyhold tenement on which timber was growing. The tenement was under lease, but by the custom of the manor the trees were reserved to the lessor upon a lease of copyhold tenements. The plaintiff communicated with the defendant by letter with regard to his having this timber for sale, and a question having arisen as to the number of the trees, it was arranged that they should go over the ground together to view the trees.

On the 27th of February they went accordingly, and the learned judge found that what took place between them on that *occasion amounted to a contract by word of [36 mouth for the sale of twenty-two trees at £26, "the trees to be got away as soon as possible." The defendant's servants entered and cut the trees upon the 2d, 3d and 4th of March. When six of the trees had been cut the plaintiff wrote a letter countermanding the sale of the 27th of February, and demanding an alteration of the terms before allowing the timber to be felled. The defendant, nevertheless, felled the remainder of the trees, and, notwithstanding a notice to the contrary from the plaintiff's solicitors, subsequently removed the whole. Before receiving the letter countermanding the sale the defendant had agreed to sell the tops and stumps to a third person.

On these facts the verdict was entered for the plaintiff for £50, leave being reserved to the defendant to move to enter it for himself, on the ground that the facts disclosed a right on the part of the defendant to cut down and remove the trees.

A rule *nisi* had been obtained accordingly, against which Nov. 4. *Cave*, Q.C., showed cause: Assuming that this contract was within the 17th section of the Statute of Frauds, and not the 4th, there was no evidence of an actual receipt of part of the subject-matter of the sale here. There

was nothing to divest the vendor's lien, and so long as that remained there could be no actual receipt. [He cited on this point *Phillips v. Bistolli* (1); *Chaplin v. Rogers* (2); *Maberley v. Sheppard* (3); *Parker v. Wallis* (4); *Boulter v. Arnott* (5).]

Secondly, this was a contract for an interest in land within the 4th section of the Statute of Frauds. This is not a case of a sale of *fructus industriales*. A contract to buy the trees as they stand, as this was, is within the statute; it is not like the case where the trees are to be reduced to timber before the property passes. If it is intended that the trees while standing in the land shall become the property of the purchaser the case is within the section. [He cited *Teal v. 37* *Auty* (6); *Evans v. Roberts* (7); *Parker v. Staniland* (8); *Carrington v. Roots* (9); *Mayfield v. Wadsley* (10); *Scorell v. Boxall* (11); *Wood v. Manley* (12); *Winter v. Brockwell* (13).]

[LORD COLERIDGE, C.J., referred to *Smith v. Surman* (14).]

That case is distinguishable, because there the vendor was to cut the trees; here the purchaser is to cut them. He is to have the property in the trees while standing, and the license given him to go on the land becomes irrevocable, because coupled with his interest in the growing timber. This amounts to an interest in land.

- *Wills, Q.C., J. Thompson and C. Dodd*, supported the rule: This was not a contract for an interest in land. There was to be no possession or use of the land for any specific time, nor was it to contribute to the growth of the thing sold. The contract was for the trees as chattels, to be removed as soon as possible. If a thing is sold when immature, and is to be allowed to grow, it may be that the sale is not merely of the thing as it stands, but of an increment to be derived from the land, and so there is an interest in the land forming part of the subject of the sale. Here what was sold was the thing as it stood. [They cited *Rodwell v. Phillips* (15), *Liford's Case* (16).]

[The court then intimated that they did not think it necessary to hear them further, but reserved their judgment.]

Cur. adv. vult.

(1) 2 B. & C., 511.

(2) 1 East, 192.

(3) 10 Bing., 99.

(4) 5 E. & B., 21.

(5) 1 C. & M., 333.

(6) 2 B. & B., 99.

(7) 5 B. & C., 829.

(8) 11 East, 362.

(9) 2 M. & W., 248.

(10) 3 B. & C., 357.

(11) 1 Y. & J., 396.

(12) 11 A. & E., 34.

(13) 8 East, 308.

(14) 9 B. & C., 561.

(15) 9 M. & W., 501.

(16) 11 Co. Rep., 49 (b).

Nov. 6. The following judgments were delivered :

LORD COLERIDGE, C.J.: This is an action in respect of the entry by the defendant upon certain land in the occupation of the plaintiff's tenant, and the cutting down of certain trees. The facts were these. The plaintiff was the owner in fee of a copyhold tenement on which certain timber trees were growing. The tenement was under lease, but the custom of the manor reserved the trees upon the tenement leased to the owner in fee of the copyhold tenement. The plaintiff had communicated with the defendant, a timber merchant, on the subject of his wish to sell the trees; but some question had arisen as to the number of the [38 trees, and it was agreed that the plaintiff and defendant should go over the land together to inspect the trees. On the 27th of February they went over the land for that purpose, and there was then a parol sale of twenty-two trees at the price of £26, and it was arranged that the trees should be "got away as soon as possible." The defendant's servants entered, and on the 2d, 3d and 4th of March, they cut down the trees. On the 2d of March, after six trees had been cut down, the plaintiff wrote countermanding the sale. The defendant had sold the tops and stumps before receipt of the letter of countermand; but, though sold before, they were not taken away until after such letter was received. If there was a valid contract for the sale of the trees, the plaintiff must fail; the trees had been sold, and the property had passed; the land was not in the plaintiff's possession, but his tenant's, and the defendant had a perfect right to do what he did. It is not denied that there was a verbal contract, and the question therefore is whether this was a contract which required to be in writing under the Statute of Frauds. If so, the defendant was in the wrong, because there was no such contract. The first question is whether this was a contract within the 4th section, as being a "contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." These words have given rise to a great deal of discussion, and very high authorities have said that it is impossible to reconcile all the decisions on the subject. If the matter were *res integra*, I should be inclined to think that there was much to be said for Littledale, J.'s, view, that the words of the statute were never meant to apply to such a matter as this at all, but only referred to such interests as are known to conveyancers. It is, however, too late now to maintain this view, inasmuch as there are a great number of decisions which proceed on the opposite view. It is clear on the decisions that there

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are certain natural growths which, under certain circumstances, have been held to be within the words of the section, and a contract with respect to which must, therefore, be in writing. The question then is what the rule is to be. The matter has been much discussed, and for my part I despair of laying down any rule which can stand the test of every conceivable case. If it is said that there is an interest 39] in land within the *section when the sale is of something which, before it is taken away, is to derive benefit from the land, and to become altered by virtue of what it draws from the soil, the rule is an intelligible one, but one which it is almost impossible to apply with absolute strictness. The effect of such a rule, if strictly applied, would vary at different times of the year. If the sale were in the spring, and the removal of the thing sold were to be postponed but for two or three days, it would not, at its severance, in strictness, be in the same state as it was at the time of the sale. On the other hand, in winter, when the sap is out of the tree, and it is standing, as it were, dead for the time being, there would be no appreciable change. It is almost impossible to say that the rule can be that, wherever anything, however small, is to pass into that which grows on the land, out of the land, between the sale and the reduction into possession, the contract is within the section.

- I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned judge, Sir Edward Vaughan Williams, in the notes in the last edition of Williams' Saunders upon the case of *Duppa v. Mayo*, p. 395: "The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should
- derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industriales*, &c., the corn and other growth of the earth which are produced not spontaneously, but by labor and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a

contract for the sale of any interest in land, but merely for the sale of goods." The propositions so laid down, as applied to the present case, seem to afford a very clear and intelligible rule. Planted trees *cannot in strictness be [40 said to be produced spontaneously, yet the labor employed in their planting bears so small a proportion to their natural growth, that they cannot be considered as *fructus industriales*, but treating them as not being *fructus industriales* the proposition is that where the thing sold is to derive no benefit from the land, and is to be taken away immediately, the contract is not for an interest in land. Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely of so much timber.

There do not seem to be any decisions which prevent our deciding in conformity with the common sense of the matter. On the contrary, there is a case of *Smith v. Surman* (1), in which the Court of Queen's Bench held, under circumstances very like those of the present case, that there was no contract for an interest in land. The only distinction that I can see between that and the present case, is that there the trees were to be cut by the vendor; but *Littledale, J.*, held that, "if in that case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in land within the meaning of the statute." This decision has never been questioned, and has been adopted in subsequent decisions. It seems to me, therefore, that both common sense and authority combine to show that this was not a contract for an interest in land within the section.

The remaining question is whether this contract was within the 17th section. This depends on whether there was here an acceptance and actual receipt of part of the goods. There have been many decisions on the question, what amounts to such an acceptance and receipt; it was very early determined that an actual manual receipt of the article sold was not necessary, but that a constructive receipt would do. Here six of the trees were cut down before the sale was countermanded, and at a time when it must be taken that that was done with the assent of the seller, and portions were sold. What more could have

(1) 9 B. & C., 561.

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41] been *done short of actually removing the trees? These were bulky trees, that a man could not carry away like a small article. If anything short of actual manual possession could be sufficient, all was done that could be done. The defendant immediately cuts down the trees and converts them into chattels, and deals with them as owner by selling the tops and stumps. In the absence of any decision on the subject, I should have said that, if it be once admitted that anything short of actual manual possession could be a sufficient acceptance and receipt, there was amply sufficient to show such an acceptance and receipt here. But we are not without authority on the subject. There have been repeated decisions that, where anything has been done on the part of the vendee under such a contract as this to the whole or part of the goods indicating an intention to deal with the subject-matter as owner in possession, and he is allowed by the vendor so to deal with it, that amounts to an acceptance and receipt within the statute. It has been held with regard to bulky things, that the delivery of the *indicia* of title was sufficient. When the purchaser had marked the goods, and left them so marked on the vendor's premises, it was held that there was a sufficient acceptance and receipt. The case of *Chaplin v. Rogers* (') seems to me to be a distinct authority for the view that there was an acceptance and receipt here, the words of the section having received all the fulfilment the subject-matter was capable of. I do not rely on the circumstance that the land was in the possession of the plaintiff's tenant. It seems to me that, apart from that circumstance, and treating the land as being the vendor's, the case is clear. The result is that the plaintiff fails on both points, and the rule must be made absolute.

BRETT, J.: This is an action by the plaintiff for injury to his reversion in certain property by reason of the defendant's having cut down and carried away certain timber-trees. It is admitted that there is no injury to the reversion if the trees in question were the defendant's by virtue of a contract which he could enforce. The first question is, whether this contract was within the 4th section of the 42] Statute of Frauds, and therefore ought to have *been in writing; and the second is, whether, if it was not, there was sufficient evidence of an acceptance and receipt of a part of the goods under the 17th section. With respect to the first point, when the subject-matter of the contract is something affixed to land, the question is whether the con-

(') 1 East, 192.

tract is intended to be for the purchase of the thing affixed only, or of an interest in the land as well as the thing affixed. In the former case the contract is not within the 4th section. Certain tests have been judicially agreed on with regard to this question, many, if not all, of which are contained in the note to *Duppa v. Mayo*, in the last edition of Williams' Saunders, which has the authority of that profound lawyer, the late Sir E. V. Williams. That note gives certain tests as applicable to particular cases. Where the subject-matter of the contract is growing in the land at the time of the sale, then if by the contract the thing sold is to be delivered at once by the seller the case is not within the section. Another case is where, although the thing may have to remain in the ground some time, it is to be delivered by the seller finally, and the purchaser is to have nothing to do with it until it is severed, and that case also is not within the section. Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are *fructus industriales*, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being *fructus industrialis*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself. Here the trees were timber-trees, and the purchaser was to take them immediately; therefore, applying the test last mentioned, the contract was not within the 4th section.

*The second question therefore arises, viz., whether [43 the contract, being a verbal one for goods above the value of £10, there was any evidence of an acceptance and actual receipt of the whole or part of them within the 17th section before the countermand of the sale by the letter of the 2d of March. It seems to me that the effect of the leave reserved is, that if there was such evidence the plaintiff must fail. It was not denied in argument that there was an acceptance; the only question therefore is, whether there

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was evidence of a receipt. Though there was an acceptance, there was no actual carrying away of the things from the premises of the seller. The seller was not in actual possession of the land, but I think that makes no difference, and the case must be treated as if he were. The purchaser, by virtue of his license to go on the land, with the acquiescence of the tenant, went on the land, and, while the verbal contract was still uncountermanded by the plaintiff, cut down six of the trees and made a sub-contract for the sale of the tops and stumps. If the sub-sale had stood alone, I should have doubted whether it would have been evidence of an actual receipt; but here he did something to the trees themselves. I should be inclined to say that where there is no actual removal of the things sold the question depends on this proposition, viz., that when there has been, during the existence of the verbal contract, for however short a time, an actual possession of the things sold, and something has been actually done to the things themselves by the buyer which could only properly be done by an absolute owner, there is evidence to go to a jury of an actual receipt of the things. This principle will, I think, be found to be the governing principle in all the decided cases. Thus, for instance, where goods were handed over the counter to the purchaser and marked by him; where casks, though not taken away, have had their spigots cut off by the purchaser, and in other similar cases there has been an actual possession by the buyer and something actually done to the goods themselves by him which could only properly be done by an absolute owner. Here, by cutting down the trees, the defendant actually did something to them which, apart from the sale over of the toppings, amounted in my opinion to an actual receipt of them. That being so, the words of 44] the 17th section seem to me *to have been satisfied. Consequently the plaintiff fails on both the questions raised, and the rule must be absolute.

GROVE, J.: I am of the same opinion. I have very little to add to the observations of my Lord and my Brother Brett. It seems to me that, in determining the question whether there was a contract for an interest in land, we must look to what the parties intended to contract for. In all the cases this has been made the test. In the case of *Smith v. Surman* (1) it was argued by Russell, Sergt., that "a sale of crops, or trees, or other matters existing in a growing state in the land may or may not be an interest in land according to the nature of the agreement between the parties and the

(1) 9 B. & C., 561.

rights which such an agreement may give;" and that view was adopted by the court in giving judgment. Littledale, J., says: "The object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels. His intention clearly was not to give the vendee any property in the trees until they were cut and ceased to be part of the freehold." Parke, J., in his judgment, also applies substantially the same test, viz., that of intention. Here the trees were to be cut as soon as possible, but even assuming that they were not to be cut for a month, I think that the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a warehouse for the trees during that period. Here the parties clearly never contemplated that the purchaser should have anything in the nature of an interest in the land; he was only to have so much timber, which happened to be affixed to the land at the time, but was to be removed as soon as possible, and was to derive no benefit from the soil. If the contract had been for the sale of a young plantation of some rapidly-growing timber, which was not to be cut down until it had become substantially changed and had derived benefit from the land, there might have been an interest in land, but this is not such a case. With regard to the second question, I agree with the observations made by the rest of the court, except that I am not satisfied that it makes no difference that the land was *not in the possession of the plaintiff, but of [45 his tenant. It seems to me that that makes the case stronger with regard to the question whether there was an actual receipt of the goods than it would have been if they had been left on land which was the property of the vendor.

Rule absolute.

Solicitor for plaintiff: *Paley.*

Solicitors for defendant: *Stubbs, for Hirst & Capes.*

In some of the states it is held that a contract for the sale of growing trees *as such*, to be severed and taken by the vendee, is not a contract for the sale of an interest in lands and need not be in writing, upon the principle that a license to enter upon land and remove trees therefrom, passes no interest in the land: See 12 Eng. Rep., 248 note; 3 Washburn's Real Est. (4th ed.), 343, marg. p. 599, 17 Am. Rep., 595 note, 15 American Law Reg., N.S., 323-8, 1 Greenl. Ev., § 271 and note.

Massachusetts: See 17 Am. R., 596 note; 3 Washb. Real Estate (4th ed.), 345; Clafin v. Carpenter, 4 id., 580; Nettleton v. Sykes, 8 id., 34; White v. Forster, 102 Mass., 578; Poor v. Oakman, 104 Mass., 316; Delaney v. Root, 99 Mass., 548.

In others the contrary is held, and such contracts are held to be void unless in writing: See 12 Eng. Rep., 248 note; 3 Washb. Real Estate (4th ed.), 343 marg. p. 599, 17 Am. Rep., 595

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note, 15 Am. Law Reg., N.S., 838-8, 1 Greenl. Ev., § 271 and note.

Canada, Upper: *McCarty v. Oliver*, 14 Com. Pl., 290; *Ellis v. Grubb*, 3 K. B., O.S., 611; *Ferguson v. Hill*, 11 Q. B., 530.

Michigan: *Russell v. Myers*, 32 Mich., 522.

New York: *Green v. Armstrong*, 1 Den., 550; *McGregor v. Brown*, 10 N. Y., 114; *Lawrence v. Smith*, 27 How. Prac., 327; *Warren v. Leland*, 2 Barb., 613; *Bennett v. Scott*, 18 Barb., 347; *Silvernail v. Cole*, 12 Barb., 685; *Pierrepont v. Edwards*, 5 Barb., 364, reversed on another point, 6 N. Y., 279. But see *Carpenter v. Otley*, 2 Lans., 451.

Wisconsin: *Warner v. Trow*, 36 Wisc., 196; *Young v. Sego*, Id., 394.

To make valid against creditors of the vendor, a sale of timber to be cut down by the vendor, there must be an actual delivery to the purchaser, after the timber is cut down, followed by an actual and continued change of possession as in the case of other chattels: *McMillan v. McSherry*, 15 Grant's (U. C.) Chy., 138.

Though the sale of standing trees by an oral contract is void, yet after the vendee has acted upon the license and severed the trees, the vendor cannot then revoke the license so as to deprive the vendee of his interest in them: *McCarty v. Oliver*, 14 Upper Can. C. P., 290; *Pierrepont v. Edwards*, 6 N. Y., 279; *Nettleton v. Sikes*, 8 Met., 34; *Lawrence v. Ervington*, 21 Grant's (U. C.) Chy., 261.

See *Babcock v. Utter*, 1 Keyes, 418.

A contract to cut trees standing upon the contractor's land into cordwood and to deliver the wood at so much per cord, is not a contract for the sale of an interest in lands, and a writing is not necessary to give it validity: *Kilmore v. Hewlett*, 48 N. Y., 569; *Bryce v. Washburn*, 4 Hun, 792; *Chamberlain v. Smith*, 21 Upper Can. Q. B., 103.

As to the validity of a chattel mortgage upon growing trees by the owner of the realty, see *Bank of Lansingburgh v. Crary*, 1 Barb., 542.

See *Sheldon v. Edwards*, 35 N. Y., 279, 22 U. C. C. Pl., 482.

A contract to enter upon another's land to cut down trees and clear it is one for work and labor only: *Forbes v. Hamilton*, 2 Tyler (Vt.), 356.

An agreement to enter upon and clear land, and take the wood after it is cut down in payment for the labor, is not for an interest in lands within the statute of frauds; and the person clearing the land may maintain trespass against the owner of the land for taking away the wood after it is cut down, although he has no possession in the land to enable him to maintain trespass *quare clausum fregit*: *Hamilton v. McDonnell*, 5 Upper Canada K. B., O.S., 720; *Monahan v. Foley*, 4 U. C. Q. B., 129.

An oral contract to sell a growing crop of hops is not, within statute of frauds, an agreement for the sale of realty required to be in writing: *Frank v. Harrington*, 36 Barb., 415; *Latham v. Atwood*, 4 Croke (Car.), 515; 1 Greenl. Ev., § 271 and note.

See note to *Earl of Falmouth v. Thomas*, 1 Cramp. & Mees., 111 and note, *Johnson & Co.'s* ed.

So to sell the potatoes then growing on a certain piece of land: *Sanisbury v. Matthews*, 4 M. & W., 343.

So of corn: *Sanborn v. Benedict*, 78 Ill., 309.

An agreement for the sale of mulberry trees growing in a nursery and raised to be sold and transported, to be delivered on the ground where they are growing, upon payment therefor being made, is not a contract for the sale of an interest in or concerning lands, within the statutes of frauds. Trees so raised are personal chattels: *Miller v. Baker*, 1 Metc., 27; *Whitmarsh v. Walker*, 1 Metc., 313.

A sale of a crop of peaches then growing in the seller's orchard, the buyer to gather and remove the peaches as they mature, is not within the statute of frauds as a sale of an interest in lands: *Purner v. Piercy*, 40 Md., 212, 17 Am. Rep., 591.

Where a fixture, growing grass, etc., is the property of a tenant, it is personal property and may be treated by him as such: *Jencks v. Smith*, 1 N. Y., 90, 1 Denio, 580, 3 Denio, 593; *Sheldon v. Edwards*, 35 N. Y., 279, 283; *Wintermute v. Light*, 46 Barb., 278; *Hallen v. Rewder*, 1 Crom., Mees. & Rose., 266; *Bostwick v. Leach*, 3 Day, 476, 484.

Where the owner of real estate by a written agreement sold all the bark thereon, it was held that the purchaser had, under such a sale, a right to fell

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the trees: *Hatch v. Fick*, 5 Grant's (U. C.) Chy., 651; *Nettleton v. Sikes*, 8 Metc., 34.

A sale of stones by the owner of a farm, accompanied by a payment for and a removal of the same by the vendee to another part of the premises, constitutes a severance and vests the title in the purchaser.

A second sale of such stones by a grantee of the farm under a deed subsequent to the first sale by his predecessor in ownership vests no title; and if the second purchaser removes them from the place where they were deposited by the first vendee, he becomes liable to an action of trespass for the value of the stones thus removed: *Fulton v. Norton*, 64 Maine, 410.

By the terms of his deed of certain land, plaintiff "reserved to himself, his heirs and assigns, the right to cut and remove all the pine, white oak and basswood, and one half of the red oak from said land, at any time before" a day named. Held, that as the deed does not *except* the wood from the grant, but merely reserves the right to cut it, plaintiff cannot maintain trover for timber (or its products) cut by his grantee upon the land before the time limited: *Martin v. Gilson*, 87 Wisc., 360, distinguishing *Rich v. Zeilsdorff*, 22 Wisc., 544, and *Tyson v. McGuineas*, 25 Wisc., 656.

Where in a conveyance of growing trees to be removed by the grantee from the grantor's land, the terms of the grant, taken in their usual and literal sense, signify an absolute conveyance of the title of the trees, the grant is not made a conditional one by a stipulation (express or implied) as to the time of removal: *Hoit v. Stratton*, etc., 54 N. H., 109; *S. C.*, Id., 452.

Under a contract for the sale of timber on certain land, with the right to enter upon said land for the purpose of cutting and carrying away said timber, "for and during the term of ten years," the party claiming under such contract cannot enter upon the land after the expiration of the time limited in the contract, for the purpose of removing timber cut prior to the expiration of the term. His right to enter and carry away expired on a particular day, and he cannot be permitted to overreach the letter of his covenant: *Boisanbin*

v. Reid, 1 Abb. Ct. App. Dec., 161, 2 Keyes, 323; *Luensterine*, etc., *v. Stilwell*, 52 How. Prac., 152.

Where a grantor in executing a deed of lands excepts and reserves "all the pine and hemlock timber suitable for sawing, and all necessary facilities for removing the same, with the right of flowing the lands now covered by the mill pond, while necessary for manufacturing the timber upon the adjacent lands," he cannot be deprived of his property or reserved rights by an allegation that a *reasonable time* for removal and manufacture has *already elapsed*, and therefore his rights are extinguished.

If any *time* could be fixed by the act of the adverse party—the owner of the premises—or by a judicial tribunal within which the power of removal and manufacture was to be exercised (which is doubtful, as the exception is absolute and unlimited), it should be in the *future* by a *notice* given to the grantor to exercise his power of removal within some time to be named, so as to enable him to obtain the benefit of his reservation: *Gregg v. Bird-sall*, 35 How. Prac., 345, 53 Barb., 402.

See *Hill v. Hill*, 113 Mass., 103; *Hill v. Cutting*, Id., 107.

A sale of wood growing on the seller's land, with the right to cut it within a specified time, but without any agreement that the purchaser may assign his rights, gives him a title to the wood *cut within that time*, which title he may sell to a third person; and that person may maintain an action against the owner of the land for subsequently burning the wood: *Nelson v. Nelson*, 6 Gray, 385; *Luensterine*, etc., *v. Stilwell*, 52 How. Prac., 152.

If no time is expressly fixed for the removal of timber purchased, the construction generally is that the grantee has a *reasonable time* for removal: *Hoit v. Stratton*, etc., 54 N. H., 109, *S. C.*, Id., 452; *Hill v. Hill*, 113 Mass., 103; *Hill v. Cutting*, Id., 107.

Under a contract for the sale of the wood and timber on certain lands, to be removed at certain specified times, if the contract be construed as making an absolute sale, the wood and timber remain the property of the purchaser, though not removed within the time provided; and the taking and removal

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of the same by the vendor is a wrongful conversion for which the purchaser has a clear right of action, though he may be liable to a breach of his covenant to remove the same within the times specified: *Green v. Bennett*, 23 Mich., 464.

On the other hand, if the sale by the terms of such contract be conditional, and the provisions for the removal thereof within the specified periods in the nature of a condition, the purchaser if the vendor should insist upon the condition, would lose all right to the wood and timber not removed within the times specified; and the vendor would have the right to insist upon this breach of condition, and hold the wood not thus removed; and this would constitute his only security against, and his only remedy for, the failure to perform the condition: *Green v. Bennett*, 23 Mich., 464; *Strasson v. Montgomery*, 32 Mich., 52; *Johnson v. Moore*, 28 Mich., 3; *Luensterine, etc., v. Stilwell*, 52 How. Prac., 152.

And a reservation by the grantor on conveyance will not enlarge this right: *Strasson v. Montgomery*, 32 Wisc., 52.

If in such contract the provisions for the removal within the specified periods be a condition, it is one which the vendor may waive; and by claiming and receiving from the purchaser damages for the failure to remove the wood and timber in time, he would waive the condition, and the wood and timber would remain the property of the purchaser, to be removed within a reasonable time: *Green v. Bennett*, 23 Mich., 464.

So the vendor may waive the provision as to time by parol or by his acts: *Lawrence v. Ervington*, 2 Grant's (U. C.) Chy., 261; *Hedley v. Scissons*, 33 U. C. Q. B., 215.

A. conveyed to B. a lot of land, reserving all the wood and timber standing, and down thereon, with one year to remove the same. Whatever wood and timber A. cuts from the soil within the year becomes his personal property, and remains his property after the year has expired, although he cannot remove the same after the expiration of the year without trespassing upon B.: *Town v. Hazen*, 51 N. H., 596.

The rule is the same as to a building purchased and to be removed by a

given time, but not removed within that period: *Davis v. Emery*, 61 Maine, 140.

If A. after the expiration of the year enters upon B.'s land without his consent and removes this wood, doing no unnecessary damage, he would only be liable to such actual damage as he caused to the land of B. in removing it: *Town v. Hazen*, 51 N. H., 596; *Hoit v. Stratton Mills*, 54 N. H., 109, S. C., Id., 452; *Davis v. Emery*, 61 Maine, 140.

But not in an action for such trespass for the damage done to the owner of the land for the trees remaining upon the land after the time for their removal: *Hoit v. Stratton Mills*, 54 N. H., 452.

B. has no lien upon the wood because it is thus left upon his land: *Town v. Hazen*, 51 N. H., 596.

A. has such an interest in and such a right to this wood, under these circumstances, as that he may maintain trover against B. for a conversion of the same: *Town v. Hazen*, 51 N. H., 596.

The fact that A. should demand this wood of B. after the expiration of the year, and B. should neglect or refuse to deliver the same, would not amount to a conversion of the wood by B.: *Town v. Hazen*, 51 N. H., 596.

If upon the application of A. for leave to enter on B.'s land, after the expiration of the year, to remove the wood, B. should refuse to give his consent, and should even forbid his doing so, that would not amount to a conversion by B.: *Town v. Hazen*, 51 N. H., 596.

If B., in order that he might clear his land, or for any other proper purpose should, after the expiration of the year, remove said wood from his land in a proper manner, and leave it in a proper place where A. could conveniently remove or use the wood, B. would not be liable for a conversion thereof: *Town v. Hazen*, 51 N. H., 596.

But if B. should, after the year had expired, remove said wood to his own land, and then sell the same or use it as his own without regard to the rights of A., he would be liable for a conversion thereof: *Town v. Hazen*, 51 N. H., 596; *Hedley v. Scissons*, 33 Upp. Can. Q. B., 215.

[Law Reports, 1 Common Pleas Division, 47.]

Nov. 23, 1875.

[IN THE COURT OF APPEAL.]

*OGG and Another v. SHUTER (').

[47

*Sale of Goods—Passing of Property—Bill of Lading deliverable to Order of Vendor—
Default of Purchaser—Jus disponendi.*

Where an unpaid vendor shipping goods under a contract of sale takes a bill of lading making the goods deliverable to his order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default.

APPEAL from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendant (').

The declaration was for conversion of 251 sacks of potatoes.

Pleas, not guilty, and that the goods were not the plaintiffs' as alleged. Issues thereon.

The facts were as follows: The plaintiffs had, in January, 1874, entered into a contract with Mons. Paresys Loustre, of Merville in France, for the purchase from him of potatoes. The contract was contained in several letters between the purchasers and the vendor. The terms ultimately agreed on were as follows, viz., for twenty tons of potatoes, at 84 fr. per 1,000 kilogrammes, *deliverable in the [48 course of the current month, free on board of a ship at Dunkirk, payment to be by cash against bill of lading signed by the captain. It was also stipulated that there should be a part payment of £30 in earnest of the bargain. The plaintiffs paid £30 in part payment, and the potatoes were shipped by the defendant's agent at Dunkirk under the contract on board the ship *Blonde* at Dunkirk for London, in sacks sent over for the purpose by the plaintiffs. The bill of lading taken by the defendant's agent made the goods deliverable to order.

The *Blonde* arrived in the Thames on the 26th of January, and the potatoes were unloaded at Cotton's Wharf on that or the next day. It was erroneously supposed by the plaintiffs, for some reason which did not very clearly appear, that the shipment was sixteen sacks short.

On the 27th of January the vendor's draft for the balance of the price was presented with the bill of lading annexed by the holders, Messrs. Devaux & Co., to whom it had been

(') Reversing 11 Eng. Rep., 316.

(*) Law Rep., 10 C. P., 159, 11 Eng. R., 316.

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indorsed; but the plaintiffs declined to accept for the full amount, and requested the holders of the draft to keep it until the discharge of the vessel, to see what there was on board. This the holders declined to do. The plaintiffs on the same day wrote to the vendor stating that the shipment was short, and that they had consequently refused to accept the draft, and requesting him to write to his agent to present to them the invoice receipted and the bill of lading of what was on board, and promising, on this being done, to send a check for the balance of the purchase-money by return of post.

On the discharge of the ship the right quantity of potatoes proved to be on board. On the 27th of January, the draft was again presented by a notary with the bill of lading attached for payment, and payment was again refused by the plaintiffs, and the draft was then noted and returned to the holders. On the 30th of January the defendant, to whom the bill of lading and draft had then been respectively given and indorsed by the vendor's agent at Dunkirk, presented to the plaintiffs the said draft with the bill of lading indorsed by the defendant annexed thereto, and requested the plaintiffs to honor and pay the draft, which the plaintiffs, for the reasons aforesaid, declined to do.

49] *On the 30th of January the plaintiffs wrote to the defendant, giving him notice that the potatoes were their property, and that if he parted with them to anybody else he would be held responsible. On the 2d of February the plaintiffs wrote to the vendor as follows: "Our Mr. Ogg having left London for Antwerp on Saturday last [30th of January], at that time we were not able to ascertain the correct quantity of potatoes shipped to us per steamer Blonde. We wish you to understand that we only want what is right, and we regret that we do not know each other better; and as we have been treated unfairly in business transactions of this nature before, we think it well to see quantity of goods before we pay on bill of lading, especially as the officials inform us of short shipment. Since Mr. Ogg's departure the potatoes have been discharged from vessel to wharf, and find on examination the goods are correct in quantity. I have telegraphed the particulars to Mr. Ogg in Antwerp, and on his return on Thursday he will then take delivery of the goods."

On the 2d of February the defendant, in consequence of instructions received from the vendor's agent at Dunkirk, sold the goods.

At the trial before Keating, J., after the foregoing facts,

and correspondence had been proved, the jury found that the goods were not of such a perishable nature as to render the sale of them necessary; and thereupon the learned judge directed the verdict to be entered for the plaintiffs, reserving leave to the defendant to move, the court to draw inferences of fact. A rule *nisi* was obtained on the ground that neither the property nor right of possession had passed to the plaintiffs, and subsequently discharged.

Nov. 22. *Milward*, Q.C., and *Willis*, for the defendant, contended that the property in the goods had not passed to the plaintiffs, and that even if it had, the vendor's lien still continued, and consequently trover would not lie.

Prentice, Q.C., and *Holl*, for the plaintiffs, contended that the property had passed, that the plaintiffs were not in default under the contract, and that, consequently, the sale of the goods was tortious, and determined the vendor's lien.

*The authorities cited were the same as in the court [50 below, and as follows: *Halliday v. Holgate* (¹); *Donald v. Suckling* (²); *Bloxam v. Saunders* (³); *Chinnery v. Viall* (⁴); *Bussey v. Barnett* (⁵); *Valpy v. Oakley* (⁶); *Simmons v. Swift* (⁷); *Dixon v. Yates* (⁸).

Cur. adv. vult.

Nov. 23. The judgment of the court (Lord Cairns, C., Kelly, C.B., Bramwell, B., and Blackburn, J.) was delivered by

LORD CAIRNS, C.: In this case it appears, from the judgments below, that the Court of Common Pleas drew the inference of fact that the plaintiffs were not in default in refusing to accept the draft for £34 which was tendered to them for acceptance along with the bill of lading. We have been unable to reconcile this finding with the statements in the case, more particularly with the statement in paragraph 13 (⁹), which seems to us to show that the plaintiffs were in default. Taking this fact, as we understand it, we think that the judgment in favor of the plaintiffs is erroneous, and should be reversed. The transactions in which merchants shipping goods on the orders of others protect themselves by taking a bill of lading, making the goods deliverable to the shipper's order, involve property of immense value, and we are unwilling to decide more than is required by the particular case. But we think this much is clear, that where

(¹) Law Rep., 8 Ex., 299.

(²) Law Rep., 1 Q. B., 585.

(³) 4 B. & C., 941.

(⁴) 5 H. & N., 288; 29 L. J. (Ex.), 180.

(⁵) 9 M. & W., 312.

(⁶) 16 Q. B., 941; 20 L. J. (Q.B.), 380.

15 ENG. REP.

(⁷) 5 B. & C., 857.

(⁸) 5 B. & Ad., 313.

(⁹) The 13th paragraph related to the refusal to accept the draft on the 30th of January.

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the shipper takes and keeps in his own or his agent's hands a bill of lading in this form to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfil these conditions, and demands the bill of lading. And we think that such a hold retained under the bill of lading is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so [51] long at least as the vendee *continues in default. It is not necessary in this case to consider what would be the effect of an offer by the plaintiffs to accept the draft and pay the money before the sale, for no such offer in this case was ever made.

Judgment reversed.

Solicitors for plaintiffs: *Dalton & Jesset.*

Solicitors for defendant: *Heather & Co.*

See *Gunn v. Bolckow*, 14 Eng. Rep., 739, 751 note.

[Law Reports, 1 Common Pleas Division, 51.]

Nov. 27, 1875.

[IN THE COURT OF APPEAL.]

WHITAKER v. FORBES (¹).

Rent Charge—Action of Debt for Arrears—Venus.

An action of debt having been brought for arrears of a rent-charge upon lands in Australia prior to the commencement of the Judicature Act:

Held, affirming the decision of the court below, that the venue in such action was local, and that it could not therefore be maintained in this country.

ERROR from the judgment of the Court of Common Pleas in favor of the defendant.

The pleadings are set out in the report of the case in the court below (²).

West, Q.C., and *Willis* argued for the plaintiff.

F. M. White and *A. P. Stone* for the defendant were not called upon.

[The following authorities were cited: *Pine v. Countess of Leicester* (³); *Mostyn v. Fabrigas* (⁴); *Doulson v. Mathews* (⁵); *Webb v. Jiggs* (⁶); *Burnett v. Lynch* (⁷); *Norris v.*

(¹) Affirming 13 Eng. Rep., 437.

(⁴) 1 Cowp., 161.

(²) Law Rep., 10 C. P., 583, 13 Eng. Rep., 437.

(⁵) 4 T. R., 503.

(³) Hob., 37.

(⁶) 4 M. & S., 113.

(⁷) 5 B. & C., 589.

Chambres ('); *Toller v. Carteret* ('); *Lord Ardglas* v. *Muschamp* ('); *Paget v. Ede* ('); *Moule v. Garrett* ('); *Barker v. Damer* ('); *Skinner v. East India Co.* ('); *Kennedy v. E. of Cassilis* (').

***LORD CAIRNS, C.:** The recent legislation provides [52 that for the future there shall be no distinction between local and personal actions as regards venue. It may be that hereafter such an action as this would be maintainable, but it is not necessary to express an opinion on the point. The question now is, whether, before the Judicature Act, an action such as this could be maintained. So far as appears on these pleadings it may be that both the parties are in this country, and have never been out of it, and it is not denied that the defendant entered into possession (which may have been through an agent) of the estate, and has received rents and profits from it more than sufficient to cover the amount of the rent-charge. Under these circumstances, if we had to consider the case apart from the authority of the decisions, it might be that we should be glad to hold, and should think it very reasonable, that the action was maintainable; but we must look to what the law of the matter is as settled by authority. There is clearly no liability here by way of contract. The defendant's liability arises, if at all, only by reason of his having taken possession of the land which is chargeable with the rent-charge. That liability, therefore, arises by reason of what is called privity of estate, i.e., in respect of the party's possession of the estate. Before real actions were abolished the only remedy during the continuance of a freehold rent-charge was by real action; but when the rent-charge had ceased to exist, debt lay for any arrears of it remaining unsatisfied. Such an action of debt was a local action to be tried by a jury of the county where the land was situate. The law in this respect is clearly laid down in the cases of *Pine v. Countess of Leicester* (') and *Thursby v. Plant* ("). Since the statute abolishing real actions, the courts have held that an action of debt will lie for the arrears during the continuance of the rent-charge. The question is whether, with regard to such actions, the same law applies as was laid down in the cases I have referred to with regard to actions of debt after the determination of the rent-charge. I do not think we can depart from

(1) 29 Beav., 246; 30 L. J. (Ch.), 285.

(2) 2 Vern., 494.

(3) 1 Vern., 75.

(4) Law Rep., 18 Eq., 118.

(5) Law Rep., 5 Ex., 132; 7 Ex., 101.

(6) Carth., 182.

(7) Cited Cowp., at p. 167.

(8) 2 Swanst., 324.

(9) Hob., 37.

(10) 1 Notes to Wms. Saund., 806-808.

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a rule of law which has been so long regarded as settled by the authorities to which I have referred and which has never since been departed from. It was suggested by Mr. Willis 53] that, though that might be the law *with regard to cases where the land was situated in England, when the land was out of England the same rule would not apply, and the venue would cease to be local. I cannot find any ground for such a proposition either in principle or on authority. The principle of the decisions seems to be, that when the venue is local the case must be tried by a jury from the place where the venue is laid, and if no such jury can be summoned the principle would seem equally to show that the case cannot be tried in England at all. Sitting in a court of error, I think we are bound by the authorities, although possibly it might be convenient that the action should lie under such circumstances as exist in the present case. The judgment of the court below must be affirmed.

KELLY, C.B.: The distinction between local and transitory actions has been recognized for centuries, and it has been clearly decided that such an action as this is local. I agree with the Lord Chancellor that it is to be regretted we have not the power to deal with this case in accordance with what would appear under the circumstances to be the justice and convenience of the matter; but we cannot assume to ourselves powers which we do not possess. We must act upon the law as laid down in a long and uniform series of decisions.

BRAMWELL, B.: I am of the same opinion. I will add nothing, except to refer to the American case of *Livingstone v. Jefferson* (¹), where the law on this subject seems to have been ably summarized by Marshall, C.J.

BLACKBURN, J.: I am of the same opinion. I do not think this case raises any question as to jurisdiction, though in some respects it has been argued as if it did. The case turns on the technical distinction between local actions, where the trial must be local, and transitory actions, and the question is one of venue only. It seems to me that the decision of the court below on this question was correct.

Judgment affirmed.

Solicitors for plaintiff: *Whitaker & Woolbert.*

Solicitor for defendant: *Donnithorne.*

(¹) 1 Brock. Rep., 203. See note 14 Eng. Rep., 440.

[Law Reports, 1 Common Pleas Division, 54.]

Dec. 11, 1875.

[IN THE COURT OF APPEAL.]

*CORY and Others v. BRISTOW.

[54]

Poor Rate—Ratability of Moorings in the River Thames—Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii. s. 91.

The conservators of the River Thames, who are by statute owners of the river bed, gave permission, by resolution, to the plaintiffs to lay down certain moorings in the river bed, and place a derrick hulk at them, the work to be done to the satisfaction of the conservators and under the inspection of the harbor master, and to remain on certain conditions being agreed to and observed by the plaintiffs. These conditions provided that a certain rent should be paid for the moorings, and specified the purposes for, and the manner in which, the hulk was to be used, and that in all other respects it was to be worked to the satisfaction of the conservators, under the inspection of the harbor master; and the permission was expressed to be granted on the full understanding, on the part of the plaintiffs, that if at any time thereafter it should be found inexpedient to permit the moorings for the derrick hulk to remain in that or any other part of the river, the conservators would, under the powers vested in them by the 91st section of the Thames Conservancy Act, cause the same to be removed. That section provides that no mooring chains shall be put down in the river without the permission of the conservators, and that the conservators may at any time, by giving a week's notice in writing, require such mooring chains to be removed; and if not removed accordingly, may themselves remove them.

In pursuance of the permission so given, the plaintiffs procured moorings to be laid down, paying for the necessary labor and materials, and placed a derrick hulk at such moorings, which had continued there for some years, and was used by the plaintiffs for the purposes of unloading and re-loading coal in the course of their business as coal merchants. The moorings so laid down consisted of anchors and stones, which were laid down in deep holes, dug in the bed of the river, and covered in with large quantities of ballast. The moorings so formed were of a permanent character, and it would have been impossible for the derrick using them to weigh them in the ordinary way in which ships weigh anchor:

Held, reversing the decision of the court below, that the plaintiffs were the occupiers of the moorings, and were liable to be rated in respect of such occupation.

ERROR from the judgment of the Court of Common Pleas upon a special case in favor of the plaintiffs.

The facts are set out in the report of the case in the court below (*).

Barrow, for the defendant.

Patchett, for the plaintiffs.

*The arguments were substantially the same as those [55] in the court below, and the following cases were cited: *Rex v. Bath* (*); *Rex v. Brighton Gas Co.* (*); *Electric Telegraph Co. v. Salford* (*); *Watkins v. Overseers of Mil-*

(*) Law Rep., 10 C. P., 504.

(*) 5 B. & C., 466.

(*) 14 East, 609.

(*) 11 Exch., 181; 24 L. J. (M.C.), 146.

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ton-next-Gravesend (¹); *Pimlico Tramways Co. v. Greenwich Union* (²); *Dyson v. Collick* (³); *London and North Western Ry. Co. v. Buckmaster* (⁴); *Allan v. Overseers of Liverpool* (⁵); *Reg. v. Morrison* (⁶); *Cory v. Overseers of Greenwich* (⁷).

JAMES, L.J.: I cannot agree in the conclusion at which the Court of Common Pleas have arrived. There is no dispute as to the general principle of law, viz., that where any part of the soil is permanently occupied by anybody for profitable purposes, as for instance, where it is occupied by a company by means of its water or gas pipes or telegraph posts, then the person so occupying is ratable in respect of such occupation; but when a person has a mere right to use the land in the nature of an easement, which does not amount to occupation, and the occupation remains in somebody else, as for example, in the case of a lodger where the occupation remains in the lodging-house keeper, then such person is not liable to be rated. The ratable quality of the portion of land so used is not gone, but it is ratable in the hands of the person who is the occupier. The question, then, in the present case, is really one of fact rather than of law, viz., what is the nature of the right given to the plaintiffs by the resolution of the conservators? Under the Thames Conservancy Acts the conservators have vested in them the bed and soil of the river with considerable powers, partly for the purpose of raising a fund for the maintenance and improvement of the navigation and partly for the benefit of the Crown. They have power to prevent anything that would be a nuisance and generally to preserve the navigation of the river. In their capacity of owners of the soil by virtue of the statute, they have power to grant a variety of [56] rights so far *as it may be done with due regard to the interests of the navigation, as, for instance, the right to make wharves and piers, and to allow moorings to be laid down. In this case they have granted to the plaintiffs the right of affixing mooring chains, and this has been done by means of a very substantial erection of a permanent character. Great holes have been dug in the soil of the bed of the river, and great stones put down, chains being passed through the stones, and seventy tons of ballast put over the stones in each hole. Such an erection is as much a permanent erection for present purpose as a house would be. The

(¹) Law Rep., 3 Q. B., 850.

(²) Law Rep., 9 Q. B., 9.

(³) 5 B. & Ald., 600.

(⁴) Law Rep., 10 Q. B., 70.

(⁵) Law Rep., 9 Q. B., 180.

(⁶) 1 E. & B., 150; 22 L. J. (M.C.), 14.

(⁷) Law Rep., 7 C. P., 499.

right to make this erection having been given by the conservators to the plaintiffs, the plaintiffs got the work done at their own expense and with their own materials. It seems to me that a grant of a right to any one to erect and maintain a permanent structure affixed to the land, such as a wall or other building, or such as the structure now in question, for his own exclusive use and benefit,—call it a license or whatever name you will,—is *prima facie* a grant of a right to have a permanent possession of the piece of land on which such structure is erected. The case is similar to that of the telegraph posts which was cited. But then it is said that we are to put a different construction on the right here granted, because the conservators have a right to remove this structure. But it seems to me that the nature of this right of removal really strengthens the conclusion we have come to. The plaintiffs are to be allowed to have possession of this structure without interference from the conservators, unless in the exercise of their functions they come to the conclusion that it is inexpedient for the public interest to permit it to remain and give a week's notice to remove it. Till then the plaintiffs are to have the full *jus possessionis* even as against the conservators themselves. And if the conservators interfered with it, it appears to me that the plaintiffs would have an action of trespass against them. It seems to me that under the circumstances the plaintiffs were the occupiers, and were ratable in respect of such occupation, and therefore that the decision of the court below should be reversed.

MELLISH, L.J.: I am of the same opinion. The first question is whether this mooring apparatus became part of the realty. If *so, it is clear that it would be the sub- [57] ject of rating. An ordinary anchor cast out of a ship would not, merely because it was fixed in the soil, become a part of the realty. That was the principle, as it appears to me, upon which the former case between these parties was decided. It was there considered that the mooring stone could not be taken to be in the nature of a permanent structure, but was only put down temporarily to keep the vessel in its place, and could be pulled up at any time like an ordinary anchor. Here, having regard to the description of the mooring stone, and the manner in which it was fixed, I cannot avoid coming to the conclusion that it had become a part of the realty. It is also quite plain that there was a profitable occupation, because a large sum of money was paid for the right to have these moorings. The only remaining question, therefore, is whether the conservators or

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the plaintiffs are in the occupation of these moorings. Now it seems to me that the Court of Common Pleas have not sufficiently taken into consideration the fact that these mooring stones all along belonged to the plaintiffs. There is a great distinction in that respect between this case and cases such as those in which the question arose, as between a person who had granted to him some right of user of the land and the grantor who had reserved some right over it to himself, which of the two was the occupier for rating purposes; as, for instance, the cases where the question was whether a party was in the position of a lodger merely, the landlord remaining the occupier, or in that of a tenant. Very nice distinctions have arisen in such cases, but there both parties have more or less a co-property in the house, or other real property in question. It is necessary in such a case to consider what degree of right each party may have. But here the conservators did not obtain any property in the mooring stones, anchors, or chains, and it was never intended that they should be applied in any way for the benefit of the conservators. I do not see how the present case can be distinguished from the cases in which water-pipes, gaspipes, and telegraph posts have been held ratable. These cases seem to me to show that where a person in possession of land allows another to make on such land an erection which becomes part of the realty, and to use such erection for his own exclusive purposes, and the land-58] owner is to have no benefit from *or interest in such erection, there is an occupation by the person making such erection in respect of which he is ratable. For these reasons, I think the judgment should be reversed.

BAGGALLAY, J.A.: I am of the same opinion. There is no question as to the legal principle upon which questions of this kind depend. The principle, as I gather it from a long series of decisions, is that the foundation of ratability is the exclusive occupation of the ratable subject. All that we have to do, therefore, is to ascertain whether the plaintiffs had the exclusive occupation of the ratable subject. I do not think it necessary to go through the facts, but I agree that the result of them is that the exclusive occupation of the moorings was in the plaintiffs. The case of the telegraph posts seems to be the most nearly in point as an authority. As a court of appeal we might reconsider the decision in that case, but it appears to me that it only follows a long series of cases all pointing in the same direction.

BLACKBURN, J.: I am of the same opinion. It is only on one point that I differ from the Court of Common Pleas.

All the judges below agreed that the manner in which these moorings were laid down was such as to render them ratable in the hands of the occupiers, whoever they might be. But they thought that the plaintiffs were not the occupiers of them. In that respect I differ from them. I will not discuss the cases in which such distinctions as that between use of a house by a person as a lodger and occupation by a tenant have been discussed with regard to rating questions. The principles which govern such cases have been explained as well as I could explain them now in two cases. One was *Smith v. St. Michael, Cambridge* (¹), a case in which it appeared to Hill, J., and myself, after consideration, that notwithstanding various strong technical expressions pointing in the direction of a demise, we must look to the real facts, and finding that the landlord was to retain possession of the premises by his servants for certain purposes, such as cleaning, we thought that he must be taken to be the occupier for the purpose of ratability, and the occupation of the commissioners of inland *revenue, to whom he [59] had granted the use of the rooms, was merely in the nature of that of a lodger. The other case is *Roads v. Overseers of Trumpington* (²), which was just the converse case, for there, though no technical words such as "rent," or "demise," were used, we thought that, looking to the whole of the agreement, there was in fact a right of exclusive possession given to the appellant, and so, that he was properly rated. It is on the application of the principles laid down in those cases to the present that I differ from the Court of Common Pleas, rather than on any question of principle. Lord Coleridge, C.J., seems to have thought that the conservators could not have intended to part with the exclusive possession of any part of the bed of the river, chiefly on the ground that it would have been contrary to the provisions of their acts to have done so, and he quotes the terms of the 91st section of 20 & 21 Vict. c. cxlvii. in proof of this; and Brett, J., also seems to have thought that a duty was imposed on the conservators not to part, for however short a time, with the absolute power and control over any part of the bed of the river. If I could see that that was so, I should have agreed that though the conservators might have used words pointing in the direction of a grant of the exclusive occupation, they must have meant only to give a right in the nature of an easement, retaining the occupation in themselves. I cannot however find any provision in the act such as the Court of Common Pleas seems to have sup-

(¹) 3 E. & E., 383.(²) Law Rep., 6 Q. B., 56.

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posed it to contain. The terms of the resolution seem to me to give the plaintiffs a right to have these moorings subject to the right of the conservators to remove them at any time on giving the week's notice required by the 91st section. Until such notice was given the conservators were bound by the bargain they had made, and I cannot doubt if they had removed the moorings without giving notice they would have laid themselves open to an action of trespass. So far from the acts prohibiting the conservators from parting with the possession of any part of the bed of the river, I find an express provision enabling them to allow moorings to be laid down and their control over the part of the river bed, where such moorings might be, to be suspended until a [60] week's notice to remove them has *expired. Under these circumstances I can come to no other conclusion than that, until such notice had been given, the plaintiffs became, by virtue of their agreement with the conservators and what was done under it, the exclusive occupiers of these moorings. That the occupation was a profitable one is clear from the facts of the case, and consequently the plaintiffs became ratable in respect of it.

Judgment reversed.

Solicitor for plaintiffs: *M. Shephard.*

Solicitor for defendant: *W. Bristow.*

Intricate and important questions of late frequently arise as to whether the occupation of a mere easement over a small piece or strip of land renders the occupant liable to taxation therefor, and by reason thereof, as the owner of real estate.

The term "lands" as used in the statute in relation to assessment and taxation (1 R. S., 360, §§ 1, 2) includes such an interest in real estate as will protect the erections or affixing, and possession of buildings and fixtures thereon, though unaccompanied by the fee; and such an interest, with the buildings and fixtures, may be assessed to the owner thereof.

Railroad corporations are not, in the purview of the tax laws, non-residents of any town in which they possess lands. Such lands are to be assessed against them the same as against inhabitants of the town, and not as non-resident lands: *People ex rel. v. Cassidy*, 2 Lana., 294, affirmed 46 N. Y., 46; *People v. Backus* 48 N. Y. 70; *Buf-*

falo, etc., v. Supervisors, 48 N. Y., 93; *Troy, etc., v. Kane*, 9 Hun, 506; *City of New Haven v. Fairhaven, etc.*, 38 Conn., 422; *Providence, etc., v. Wright*, 2 Rhode Island, 459; *People v. Fredericks*, 33 How. Pr., 150, 48 Barb. 173; *Sangamon, etc., v. Morgan Co.*, 14 Ills., 163; *State v. Hancock*, 33 New Jersey Law Rep., 315; *State v. Com'rs*, 23 id. (3 Zab.), 510; *Kansas v. Culp*, 9 Kans., 38, reversed on another point, 16 Wall., 603; *Railway Co. v. McShane*, 23 Wall., 444.

See *Town, etc., v. Ohio, etc.*, 77 Ills., 539; *Grand, etc., v. Hemel Hempstead*, L. R., 6 Q. B., 173.

So a horse railroad laid in public streets: *Appeal of N. B. & M. R. R.*, 32 Cal., 499, 506-513, 4 Week. Dig., 307.

And gas pipes laid in public streets: *Providence Gas Co. v. Thurber*, 2 R. Island, 75.

But see *contra*, *People v. Board, etc.*, 39 N. Y., 81.

The distinction between the case of *People v. Board, etc.* (39 N. Y. 81), and

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that of *People v. Cassity* (46 N. Y., 40), seems to be that in the former case the owners of the gas main had no right of control or possession of the land in which the mains lay, while in the latter case the railroad had both. The distinction however is very fine. The gas company certainly has possession *pro hac vice* of the land on which the gas main rests and that surrounding, though not perhaps of the surface above it. The principal case would seem to be substantially contrary to *People v.*

Board, 39 N. Y., 81; and so is *Providence Gas Co. v. Thurber*, 2 Rhode Island, 15.

The suspension bridge across the Niagara Falls at Clifton, with the stone towers, etc., supporting it, is land and real property within the Assessment Act 29 & 30 Vict. ch. 52, § 3; *Niagara Falls, etc., v. Gardner*, 29 Upper Can. Q. B., 194.

As to how railroads are to be assessed in New York for school district taxes, see 2 Laws 1867 (chap. 694), p. 1744.

[Law Reports, 1 Common Pleas Division, 77.]

Nov. 22, 1875.

***THE LONDON AND SOUTH WESTERN RAILWAY COMPANY V. CYRIL FLOWER and Others. [77]**

Construction of Private Act—Covenant to Repair—Notice.

The defendants' predecessors in title obtained an act for the formation of a road which was to pass under a railway by means of a bridge. By the act it was provided that the undertakers should not enter upon or interfere with the railway, or execute any work whatsoever under or affecting the same, until they should have delivered to the company plans, drawings and specifications of the works intended to be executed under or affecting the railway and works thereof, such plans, &c., to describe the manner of executing the intended works, and the materials to be used for the purpose, nor until those plans, &c., should have been examined and approved by the engineer of the company; and that "the same works should be executed and thereafter maintained by the undertakers at their sole expense in all things, according to such approved plans, &c., under the superintendence and to the reasonable satisfaction of the engineer of the company." And it was further provided that the undertakers should from time to time be responsible for and make good to the company all costs, losses, damages and expenses which might be occasioned to the company by reason of the execution or failure of any of the intended works, or of any act or omission of the undertakers, &c.

The bridge was accordingly constructed of brick piers and iron pillars, of iron girders resting upon the piers and pillars, and of timber and wood-work. In the construction of the bridge, the brick and iron work was done by the defendants' predecessors in title, under the superintendence of the plaintiffs' engineer. The timber and wood-work,—the superstructure,—was done by the plaintiffs' engineer at the expense of the undertakers, and with materials provided by them.

The structure was completed in 1864. In 1872 certain repairs became necessary to the superstructure of the bridge, which repairs were executed by the company, who claimed to be reimbursed their outlay in so doing by the defendants, although the defendants had had no notice nor any knowledge or means of ascertaining that the repairs were necessary:

Held, that the plaintiffs were not entitled to recover the expenses so incurred.

THIS was an action brought to recover £147 2s. expenses incurred in maintaining a bridge constructed under the Queen's Road, Battersea, Extension Act, 1863, a copy of which act was annexed to the special case.

1. The bridge in question is the bridge under the London

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and South Western railway, mentioned in the 8th and 16th sections of the above-mentioned act; and the defendants are the owners for the time being of Long Hedge Farm, within the meaning of the 2d section.

2. The bridge is constructed of brick piers and iron pillars, 78] of *iron girders resting upon the piers and pillars, and of timber and wood-work. In the construction of the bridge, the brick and iron work was done by the defendants' predecessors in title, under the superintendence of the plaintiffs' engineer. The timber and wood-work was done by the plaintiffs' engineer at the expense of the defendants' predecessors in title, and with materials provided by them.

3. The bridge was completed in the year 1864; and, on the road over which it is constructed having been completed and dedicated to the public, the said road was taken to by the Board of Works for the Wandsworth district.

4. The bridge supports the railway lines of the plaintiffs, over which trains are passing and repassing by day and night at short intervals.

5. During the year between the 31st of March, 1872, and the 31st of March, 1873, repairs became necessary to the superstructure of the bridge. The parts of the bridge needing repair were works maintainable under the last clause of s. 11 of the act. The necessary repairs were executed by the plaintiffs, and the reasonable costs thereof amounted to £147 2s.

6. No notice was ever given to the defendants of the necessity for such repairs as mentioned in the last paragraph before the execution thereof by the plaintiffs; nor had the defendants any notice of the present claim till the 12th of May, 1873.

7. The bridge, at the times when the repairs in question became necessary, and were executed, was in the exclusive occupation and possession of the plaintiffs. And the fact that the repairs were necessary could only be ascertained by entry upon and examination of the bridge, and, as to some of them, by removing parts of the wood-work of the bridge.

8. The repairs in question were not of such a character as to be of frequent occurrence; they were such as in the ordinary course of things would only become necessary at intervals of from five to ten years, and such as in the ordinary course of business would, when required, be executed once for all, as an entire job.

9. The court were to be at liberty to draw inferences of fact.

The question for the opinion of the court was whether the plaintiffs were entitled to recover the amount claimed.

*If the opinion of the court should be in the affirmative, judgment was to be entered for the plaintiffs for £1472s., with costs. If the opinion of the court should be in the negative, judgment was to be entered for the defendants, with costs.

Wood, Q.C. (Brown, Q.C., and Mangles, with him), for the plaintiffs: The question in this case turns upon the construction of a local act of 26 Vict. c. xlv, authorizing the construction of a new public road from Battersea to Clapham. The act recites (amongst other things) that the intended road would pass for nearly its entire length through that part of an estate known as "Long Hedge Farm," situated in the parishes of Battersea and Clapham, which is the property of William Woodgate and Philip William Flower. It further recites that, inasmuch as the London and Brighton, the London and South Western, and the London, Chatham and Dover railways traversed the line of the proposed road and impeded the construction thereof, it was expedient that the powers thereafter contained should be granted for constructing the road across the railways; that Woodgate and Flowers were willing to construct the road, and that it was expedient that they should be authorized so to do, and to dedicate the same to the public; and that plans and sections showing the line and levels of the road, &c., and also a book of reference to such plans and sections, had been deposited with the clerk of the peace. By the interpretation clause, s. 2, "the undertakers" are to mean "the said William Woodgate and Philip William Flower, or other the owners or owner for the time being of the said part of the estate known as Long Hedge Farm." Sect. 5 enacts that, "subject to the provisions in this act and in the acts and parts of acts incorporated therewith⁽¹⁾ contained, the undertakers may make and *maintain* the said road in the line according to the levels, and upon the lands delineated on the said plans and sections, and described in the book of reference so deposited as aforesaid." Sect. 8 enacts that "the road shall be made throughout of the width of not less than sixty feet, *except where the [80] same shall be carried by a bridge over the authorized line of the West End of London and Crystal Palace railway, where it shall be of a width of not less than forty feet; and every

⁽¹⁾ The Lands Clauses Consolidation Act, 1845, except ss. 10 and 11 thereof, and ss. 6 to 12 (both inclusive), and ss. 15 and 16 of the Railways Clauses Consolidation Act, 1845.

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bridge shall be made to the approbation in all things of the engineer of the Metropolitan Board of Works; and the headway of the iron girder bridge by which the road shall be carried under the London and South Western railway shall be of the height of fifteen feet at the least." By s. 10 it is provided that nothing in the act contained shall authorize the undertakers to "alter, vary, or interfere with the London and South Western railway, or any of the works thereof, further or otherwise than is necessary for the construction and maintenance under the London and South Western railway of the road by the act authorized at the point indicated on the deposited plan of that road." Sect. 11, which is the important one, enacts that, "notwithstanding anything in this act contained, the undertakers shall not, for the purpose of so forming or maintaining the intended road under the London and South Western railway; acquire any ownership of or in any land or property of the London and South Western Railway Company, but only an easement or right so to form and maintain and use the intended road under the London and South Western railway; and the undertakers shall not enter upon or interfere with the London and South Western railway, or any of the land or works of the London and South Western Railway Company, or execute any work whatsoever under or affecting the same, until they shall have delivered to that company plans, drawings, and specifications of the works intended to be executed under or affecting the London and South Western railway and the lands and works thereof, such plans, drawings, and specifications to describe the manner of executing the intended works, and the materials to be used for the purpose, nor until those plans, drawings, and specifications shall have been examined and approved in writing under his hand by the principal engineer of the London and South Western Railway Company, or, in the event of his neglecting or declining to approve the same for one calendar month after such plans, drawings, and specifications shall have been delivered to that company, until the same shall have been so examined and approved 81] by an engineer to be appointed *by the Board of Trade; and the same works shall be executed and thereafter maintained by the undertakers at their sole expense in all things according to such approved plans, drawings, and specifications, under the superintendence and to the reasonable satisfaction of the principal engineer for the time being of the London and South Western Railway Company." The 14th section is as follows: "Notwithstanding anything in this

act contained, the undertakers shall from time to time be responsible for and make good to the London and South Western Railway Company all costs, losses, damages, and expenses which may be occasioned to the London and South Western railway, or to any of the works or property thereof, or to the traffic thereon, or to any person or persons using the same, or otherwise, by reason of the execution or failure of any of the intended works, or of any act or omission of the undertakers, or of any of the persons in their employ, or of their contractors or others; and the undertakers will effectually indemnify and hold harmless the London and South Western Railway Company from all claims and demands upon or against them by reason of such execution or failure, and of any such act or omission." The only other section which is at all material is the 16th, which provides that "The arch or bridge over the intended road at the point where that road crosses under the London and South Western railway and the works connected therewith, shall be of such dimensions and so constructed as to admit of the convenient maintenance on and over the same of four lines of railway at the least; and, if the undertakers be thereunto at any future time required by the London and South Western Railway Company, in writing under their common seal, the same arch or bridge and other works of the undertakers shall be from time to time so widened and enlarged on either or both sides thereof, in the option of the London and South Western Railway Company, as to admit of the convenient maintenance on and over the same of four additional lines of railway, making on the whole eight lines of railway; and all and singular the provisions of this act with reference to the construction in the first instance and maintenance of the intended road under and in connection with the London and South Western railway, shall apply to the works of and incident to the said widening and enlargement."

*That the expense of the repairs from time to time [82 becoming necessary for the maintenance of the bridge contemplated by the act was to be borne by the undertakers and their successors in title, will not be disputed. The only question is whether or not they were entitled to notice before the company caused the repairs to be done. Now, it is not immaterial to bear in mind that, when the bridge was first constructed (in 1864), that portion of it which consisted of brick piers, iron pillars, and iron girders, was built by the defendants' predecessors in title under the superintendence of the plaintiffs' engineer; but that the wood-work,—

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that portion of the structure upon which the rails are laid,—was done by the plaintiffs' engineer at the expense of the undertakers and with materials supplied by them; and that it was this latter portion of the work which required repair. And these repairs, it is obvious, could only be done by the plaintiffs themselves, and could not with safety to the public be suffered to remain undone for any period of time however short. Under these circumstances, the only reasonable construction of the act is, that such repairs should be done by the plaintiffs themselves, and be paid for by the undertakers, as provided by s. 11. In *Vyse v. Wakefield* (¹), Lord Abinger, C.B., says: "The rule to be collected from the cases seems to be this, that, where a party stipulates to do a certain thing in a certain specified event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice unless he stipulates for it: but, where it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given to him. That is the common sense of the matter." And Parke, B., adds (²): "The general rule is, that a party is not entitled to notice, unless he has stipulated for it." Here, the defendants' predecessors were the promoters of the act, and might have stipulated for notice if they had thought fit. The case finds that, from the nature of the structure, these repairs would be required periodically: and the defendants must be assumed to have been aware of the fact. The entire object of these provisions of the act would be defeated if the company were bound to give the parties notice of wants of repair which could by no possibility be amended by any one but the company themselves; especially, seeing that there might be 83] *some difficulty in ascertaining at the moment who were the successors in title of the original undertakers. [*Colley v. Streeton* (³) was also referred to.]

Day, Q.C. (*Finlay* with him), for the defendants: There is nothing in the act of Parliament in question to entitle the railway company themselves to repair the bridge and to charge the defendants with the expenses so incurred,—at all events, not without first giving them notice that repairs were wanted, and giving them an opportunity of doing them. The case is decided by *Makin v. Watkinson* (⁴). It was there held that, where a lessee had covenanted to keep in repair the main walls, main timbers, and roofs of the demised premises, he could not be sued for a breach unless

(¹) 6 M. & W., 442, 452.

(²) 6 M. & W., at p. 453.

(³) 2 B. & C., 273.

(⁴) Law Rep., 6 Ex., 25.

he had notice that the premises were out of repair. Channell, B., there says: "Here, repairs are to be done to the exterior of the premises, as to which it is just possible that the lessor might by observation acquire a knowledge of their necessity. But the main timbers of the building, which must be within its carcase, are to be kept in repair; and of the repairs required for these he could have no knowledge without notice. He could not enter to see the condition of those parts, even though, independently of his obligation under the covenant, it might be of great consequence to him to be acquainted with it. Here, therefore, by the rule of common sense, which is supported by the case of *Vyse v. Wakefield* (1), we ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called upon under the covenant to make it good." Bramwell, B., concurred in that decision, though Martin, B., inclined to dissent. [He was stopped by the court.]

Wood, Q.C., in reply, relied upon Baron Martin's judgment in *Vyse v. Wakefield* (1), and contended that, to hold a notice to be necessary in this case would be importing into the act of Parliament words which are not found there.

BRETT, J.: In this case the plaintiffs are in the exclusive possession of a bridge over which their railway runs, which bridge was built by and at the expense of the defendants' predecessors in title under the powers of a Road Act of [84 26 Vict. c. xlvi. The bridge, which the defendants were bound to repair, becoming dilapidated, the plaintiffs proceeded to do the necessary repairs to it, and this without notice to the defendants of the want of repair, and without first calling upon them to put the bridge in repair. Now, unless the act of Parliament expressly gives the plaintiffs the right to do this work without request, and to charge the defendants with the cost thereof, I know of no principle of law upon which the plaintiffs' claim can be sustained. The question therefore is, what is the true construction of the act,—whether it gives the plaintiffs power to do the necessary repairs to the bridge without first giving notice of the want of repair to the defendants and calling them to repair. I am of opinion that the act gives the plaintiffs no such authority. I will assume that the defendants were by the act bound to maintain the bridge in a proper state of repair. I will assume also that by implication they had a right to go upon the railway for the purpose of examining the condition of the bridge and ascertaining whether or not

(1) 6 M. & W., 442.

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it needed repair. But I must take into consideration the nature of the bridge, viz. that it is in the exclusive possession of the company and used exclusively by them for the traffic along their railway, and that it might be out of repair in such a way that the want of repair might not be ascertainable upon an examination such as the defendants could make. Upon the statements and findings in the case, it is obvious that this is a bridge the want of repair of which might be known to the plaintiffs without being known to the defendants, and that very serious consequences might result from any delay in putting the structure in a proper condition to sustain the traffic. The question is whether, the want of repair being known to the plaintiffs, and being of such a nature as not to be necessarily or even probably known to the defendants, the former can, without giving the latter any notice, do the repairs themselves and charge them with the costs. It would, I think, be a very strong thing if the act did give the plaintiffs this power specifically: and I am unable to see that it does so. Mr. Wood contends that the plaintiffs have this power by necessary implication. I cannot agree with him. When the want of repair is known to the plaintiffs, who are in the exclusive possession of the 85] structure, and is not and *cannot with reasonable diligence be known to the defendants, it would seem to be contrary to natural justice to hold that the plaintiffs can, without giving the defendants notice of the duty which is sought to be cast upon them, take upon themselves to perform that duty for the defendants and charge them with the expense. It seems to me that the doctrine laid down in *Makin v. Watkinson* (1) will materially help us in coming to a right construction of this act. The act is not a contract between the parties, but it is next door to it: and I decide this case upon the ground that the doctrine of *Makin v. Watkinson* (1) is as applicable to the construction of an act of Parliament as to that of an ordinary contract. The reason of the thing is this, that, where there is knowledge in the one party and not in the other, there notice is necessary. Any other construction would seem to me to be contrary to natural justice, and ought not to be adopted by mere implication, but must rest upon the express enactments of the statute. For these reasons, I am of opinion that the defendants are not liable in this case. Reliance was placed upon the 14th section of the act. But that section does not enable us to make the implication suggested: it manifestly has reference to omissions to do something

(1) Law Rep., 6 Ex., 25.

after notice. In doing the repairs in question the plaintiffs were mere volunteers: they were under no legal obligation to do them. And I see nothing in the act which either expressly or by implication casts upon the defendants the obligation to repay the plaintiffs the expense which they have thought fit to incur. I am therefore of opinion that our judgment should be for the defendants.

DENMAN, J.: I am of the same opinion. If the thing complained of here had been an omission on the part of the undertakers in the execution by them of any duty imposed upon them by the act, the plaintiffs might have been entitled to recover. But in my judgment this is not a case of omission within the meaning of s. 14. We must see, then, what it is that the undertakers are required by the act to do. Their duty is pointed out in s. 11. Before commencing to build the bridge in question, the undertakers are to submit for the approval of the principal *engineer of the company [86 “plans, drawings, and specifications to describe the manner of executing the intended works, and the materials to be used for the purpose:” and then the section goes on,— “and the same works shall be executed *and thereafter maintained by the undertakers at their sole expense* in all things according to such approved plans, drawings, and specifications under the superintendence and to the reasonable satisfaction of the principal engineer for the time being of the company.” The case of lessor and lessee is very analogous. One of the first principles of natural justice is, that, where a party is required, whether by a private contract or by an act of Parliament, to do an act the doing of which is contingent upon the necessity for it arising at some uncertain time, before he can be charged with a breach of duty in not doing the act, he must have notice that the time for doing it has arrived, so as to have an opportunity of performing his obligation. A striking instance of that is to be found in the case of *Cooper v. Wandsworth District Board of Works* (*). Further, I think that, as the 14th section of the act requires the undertakers, not simply to erect and maintain the bridge, but to do it to the satisfaction of the engineer of the company, the necessity for holding that what is to be done is to be done after notice from the company is made abundantly manifest. This seems to me to be the natural and legitimate construction of the act of Parliament. The company, therefore, not having given the defendants notice of the want of repair of the bridge in question, it was not competent to them to do the work themselves and call upon

(*) 14 C. B. (N.S.), 180; 32 L. J. (C.P.), 185.

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the defendants to pay for it. They cannot rely on s. 14, because there could be no omission on the part of the defendants until they had been set in motion by a notice.

LINDLEY, J.: I am of the same opinion. I am desirous of excluding the case of inability on the part of the defendants to ascertain whether or not the bridge was defective, and also the case of mutual ignorance of the existence of defects. The case we have to deal with is that of the plaintiffs knowing the bridge to be out of repair and giving the defendants no notice of that fact, but doing the repairs 87] themselves and then calling upon the defendants *to repay them the expenses they have incurred. I am of opinion that they cannot do that. And I base my opinion upon the case of *Makin v. Watkinson* (¹), and upon the plain meaning of the act. I cannot read the 11th section of the act without seeing that the minds of both parties are to be consulted with regard to the repairs. The defendants are only bound in a qualified manner to maintain the works, viz., according to plans, drawings, and specifications approved by the principal engineer of the company, and under his superintendence. The defendants could not do this without consulting the plaintiffs: still less could the company repair the bridge without giving notice to the defendants that it required repair, and calling upon them to repair it.

Judgment for the defendants.

Solicitor for plaintiffs: *Lewis Crombie.*

Solicitors for defendants: *W. & J. Flower & Nussey.*

(¹) Law Rep., 6 Ex., 25.

See 13 Eng. Rep., 691 note.

It is provided in New York (Laws of 1850, chap. 140, § 28, sub. 5, 3 Edm. St., 627), that railroad companies shall have power "To construct their road across, along, or upon any stream of water, watercourse, street, highway, plank road, turnpike, or canal, which the route of its road shall intersect or touch; but the company shall restore the stream or watercourse, street, highway, plank road, and turnpike thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness."

Similar provisions are contained in the statutes of most of the states.

As to restoring a public highway: *People v. Green*, 58 N. Y., 152; *Town, etc., v. Providence, etc.*, 10 R. I., 365;

Illinois Cent., etc., v. Bentley, 64 Ills., 438; *People v. Chicago, etc.*, 67 Ills., 118; *Easton, etc., v. Greenwich*, 25 N. J. Eq., 565; *Roberts v. Chicago, etc.*, 35 Wisc., 679; *Duffy v. N. W. Railw. Co.*, 32 Wisc., 269; *Phillips v. Dunkirk, etc.*, 78 Penn. St., 177; *Snow v. Deerfield*, 78 Penn. St., 181; *Burritt v. New Haven*, 42 Conn., 174; *People v. Troy & Boston*, 37 How. Prac., 427; *Baxter v. Spuyten Duyvil R. R.*, 11 Abb. Prac., N.S., 178, 61 Barb., 428; *Fletcher v. Auburn, etc.*, 25 Wend., 462; *Fairbanks v. Great Western, etc.*, 35 Upp. Can. Q. B., 523; *Van Allen v. Grand Trunk*, 29 Upper C. Q. B., 436; *Ward v. Great Western*, 13 U. C. Q. B., 315; *Regina v. Great Western*, 12 U. C. Q. B., 250; *Whitmarsh v. Grand Trunk*, 7 U. C. Com. Pl., 373; *Town of Dun-*

das v. Hamilton, etc., 18 Grant's (U.C.) Chy., 311, reversing 17 id., 31; Fredericksburgh v. Grand Trunk, 6 Grant's (U.C.) Chy., 555.

After so restoring it the company is bound to keep a bridge constructed as a part of the new road in repair: Van Allen v. Grand Trunk, 29 U. C. Q. B., 436; Heacock v. Sherman, 14 Wend., 58; Dygert v. Schenck, 23 Wend., 446.

Whether the town would be liable to one injured, quere? Dygert v. Schenck, 23 Wend., 446; People v. Troy, etc., 37 How., 430; Fairbanks v. Great Western, etc., 35 U. C. Q. B., 523; Whitmarsh v. Grand Trunk, 7 U. C. Com. Pl., 373.

For restoring track of turnpike too near its own track: Moshier v. Utica, etc., 8 Barb., 427.

As to liability to the owner of land for not properly restoring a stream to its former state: Robinson v. N. Y. & Erie, etc., 27 Barb., 512; Brown v. Cayuga, 12 N. Y., 480; Chicago, etc., v. Moffitt, 75 Ills., 524; Bellinger v. N. Y. Cent. R. R., 23 N. Y., 42; St. Peter v. Denison, 58 N. Y., 416; Cott v. Lewiston, 86 N. Y., 214; Pixley v. Clark, 35 N. Y., 520; Young v. Chicago, etc., 38 Wisc., 171; Conhocton, etc., v. Buffalo, etc., 8 Hun, 521; Arnold v. Hudson River, etc., 49 Barb., 108, 121.

As to controlling the manner of building a highway or bridge, see 13 Eng. Rep., 691 note; People v. Green, 58 N. Y. R., 152; Jamieson v. County of Lanark, 38 U. C. Q. B., 647.

C A S E S
DETERMINED BY THE
EXCHEQUER DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE EXCHEQUER DIVISION,
AND BY THE
DIVISIONAL COURTS OF APPEAL
FROM
INFERIOR COURTS,
XXXIX VICTORIA.

[Law Reports, 1 Exchequer Division, 1.]

Nov. 15, 1875.

1] HALL V. NOTTINGHAM and Others.

Custom—Claim by Inhabitants to Recreation in Another's Freehold.

A custom for the inhabitants of a parish to enter upon certain land in the parish, and erect a maypole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any times in the year, is good.

APPEAL from the County Court of Shropshire, holden at Ludlow.

The action was brought against the defendants, parishioners of Ashford Carbonnell, in the county of Salop, for trespass on a field called the Maypole Piece, situate in that parish. The defendants justified under the custom set out below. The learned judge found that the freehold was in the plaintiff, and that the land was a piece of glebe land situate in an inclosed field of the plaintiff, which glebe was

exchanged in 1870 by the then incumbent of Ashford Car-bonnell (with the consent of the bishop) with a predecessor of the plaintiff for an equal portion of another field in the *parish of equal value; that the land had been regu- [2 larly rated to the poor, and tithe paid and commuted for the same, and that the custom set up by the defendants, and under which they justified, had been for a number of years claimed by the parish and disputed by the owner for the time being of the land. The learned judge being of opinion that the land was subject to a lawful custom for the inhabitants of the parish to erect a maypole on the ground, and dance round and about the same, and otherwise enjoy any lawful and innocent recreation at any times in the year on the land, gave judgment for the defendants. From this judgment the plaintiff appealed.

The question for the opinion of the court was whether the custom alleged is good in law.

Masterman, for the plaintiff: The custom found is bad, on the ground that it is too general, that it is uncertain, and is not confined to reasonable periods. The effect of it is that it might absolutely deprive the freeholder of the use of his land if a succession of games were to be kept up all the year round. *Millechamp v. Johnson* (*) is an authority that a custom extending to all rural sports is bad. The land would be subject to a servitude incapable of judicial control: Lord St. Leonards in *Dyce v. Hay* (*).

Bosanquet, for the defendants: The plaintiff's proposition would, if upheld, amount to the abolition of village greens. *Abbot v. Weekly* (*) shows that the custom must be taken, though found generally, to be for seasonable times. *Fitch v. Rawling* (*) is an authority that a custom is good which includes all kinds of lawful games, and *Mounsey v. Ismay* (*) shows conclusively that there is no necessity to allege the custom at seasonable times. Martin, B., remarked in that case, on the decision in *Bell v. Wardell* (*), in the note to which *Millechamp v. Johnson* (*) is reported.

Masterman, in reply: The argument on the other side assumes that this is a village green, but the statement in the case is that it is the plaintiff's freehold, and glebe land, inclosed and rated. In *Mounsey v. Ismay* (*) the claim was limited to one day in the year and to one sport.

*KELLY, C.B.: I own to having entertained some [3 doubt in this case; because if we hold the custom good, it

(1) Willes, at p. 205, n.

(2) 1 Macq., 305.

(3) 1 Lev., 176.

(4) 2 H. Bl., 393.

(5) 1 H & C., 729; 32 L. J. (Ex.), 94.

(6) Willes, 202.

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may have the effect of taking away from the owner of the freehold the whole use and enjoyment of his property, and we ought therefore to require some clear and distinct authority before we hold anything which would produce such a consequence. The matter comes to be a question of authorities; but among these there appears to be an irreconcilable difference. On the one hand we have the cases of *Abbot v. Weekly* (¹), and *Fitch v. Rawling* (²), and on the other the case reported in the note to *Bell v. Wardell* (³). In the latter case it was held that a custom for all the inhabitants of the town for the time being to have and enjoy the liberty and privilege of playing at any rural sports or games in a close every year, at all times of the year, at their will and pleasure, was a bad custom. It was not so held on the ground that the expression "at all times of the year" was too general, for that expression was held not to mean more than at all seasonable times; but only on the ground that the custom as laid down was too general. Some sports may occupy the whole surface of the land, and thus this custom might take that entire surface out of the possession of the owner at all times. This I take to be the *ratio decidendi* in that case; but, on the other hand, we have *Abbot v. Weekly* (¹) and *Fitch v. Rawling* (²). In the first of these it was held that the dancing there mentioned might be held at all times of the year, and, taking the two cases together, they show that all lawful games and pastimes may be used at all times. I think we ought to give effect to these authorities, as being of more weight than that on the other side, and therefore our judgment must be for the defendants, and the appeal must be dismissed.

CLEASBY, B.: I am of the same opinion. The one question submitted to us is whether the custom alleged can have a legal existence. I believe the proper meaning of the word "custom," as applied to a matter of this description, is something that has the effect of local law, but the general law puts a limit on that, and requires that it shall be reasonable and certain. Now, with respect to the custom in this case being reasonable, it is unnecessary to do more than refer to the two cases cited, *Abbot v. Weekly* (¹) and *Fitch v. Rawling* (²), with which the case of *Millechamp v. Johnson* (⁴) to some extent agrees, and we have, further, the authority of Lord Campbell in *Race v. Ward* (⁵). Here, however, another objection is put forward, and we are to

(¹) 1 Lev., 176.

(²) 2 H. Bl., 893.

(³) Willes, 202.

(⁴) Willes, p. 205, n.

(⁵) 4 E. & B., 702; 24 L. J. (Q.B.), 153.

determine whether we are justified in saying this is so uncertain as to be bad. Looking to the nature and origin of such customs, it would be unreasonable to expect any precise certainty as to what should be enjoyed as a matter of right. If at the present time the inhabitants all met to discuss and determine such a matter, it would be unreasonable to expect them to be very precise as to the enjoyment which they were to have. I cannot myself see, independently of authority, that there is anything so uncertain in this alleged custom that we are bound to reject it. No doubt the case of *Millechamp v. Johnson* (1) is to the effect that a custom to enjoy "any rural sports or games" was bad, as too general and uncertain; but in that case the words are very general, while on the other hand, the only distinction between the case of *Fitch v. Rawling* (2) and the present is that in the former the custom is specified to be enjoyed at seasonable times; but it has been held that this must be taken to be the case where the more general allegation claiming the use at all times is used. I think, therefore, with my Lord, that we should not go against these authorities in a direction to limit the rights and enjoyment of the public.

AMPHLETT, B., concurred.

Judgment for the defendants.

Solicitors for plaintiff: *Abbott & Co., for C. J. Bowles, Ludlow.*

Solicitors for defendants: *Pownall, Son, Cross & Knott, for H. T. Weyman, Ludlow.*

(1) Willes, p. 205, n.

(2) 4 E. & B., 702; 24 L. J. (Q.B.), 153.

[Law Reports, 1 Exchequer Division, 5.]

Nov. 23, 1875.

*BROWN V. BRINE, Executor.

[5

Contract—Illegal Consideration—Promise not to expose Misconduct of Plaintiff—Public Policy.

To action on a bond against the defendant as executor, he pleaded that the plaintiff had seduced and committed adultery with the wife of the defendant's testator, between whom and the plaintiff it was agreed, that in consideration that the defendant's testator would not expose and make public the conduct of the plaintiff, he would not sue on the bond. On demurrer to the plea:

Held, that there was no valid consideration for the agreement, and that the plea was bad.

DECLARATION against the defendant as executor of Henry William Brine on a bond under his seal.

Plea for defence on equitable grounds, that, before the making of the bond in the declaration mentioned, the plaintiff had seduced and committed adultery with the wife of Henry William Brine, and that, after the making of the bond and before the commencement of this suit, the plaintiff promised Henry William Brine, and it was mutually agreed by and between them, that if Henry William Brine should not and would not expose and make public the conduct of the plaintiff with regard to the seduction and adultery, he, the plaintiff, would not enforce payment of the penal sum in the bond or any part thereof or any money thereby secured, or sue for the same. Allegation, that in pursuance and performance of the agreement, Henry William Brine, deceased, did not, during his lifetime, expose or make public the conduct of the plaintiff with regard to the seduction and adultery; but, relying upon the promise of the plaintiff, faithfully performed his part of the agreement; further allegation, that the defendant had not, since the death of Henry William Brine, and while executor, exposed or made public the conduct of the plaintiff.

Demurrer and joinder.

Nov. 15. *Kingdon*, Q.C., for the plaintiff: There are two objections to the plea. The agreement alleged in it is against public policy, and, further, the plea is pleaded in bar, though it operates only as a suspension of the right of 6] the plaintiff to sue *during the time the deceased should abstain from exposing him. This is the subject only of a cross action. [He referred to *Gipps v. Hume* (').]

Edwards, Q.C. (*Goddard*, with him): It is not immoral that a person should abstain from using the right of divorce, though it may be against public policy that proceedings once instituted, as in *Gipps v. Hume* (') should be compromised; though the contrary was decided before the Divorce Act, in *Wilson v. Wilson* ('). If this were an application to the Court of Chancery to restrain the action there would be good ground for a perpetual injunction: *Hunt v. Hunt* (').

Kingdon, Q.C., in reply: The agreement is against public policy in two respects; in the first place, because it would deprive people of the opportunity they would have of declining to associate with the plaintiff, and, secondly, on the ground that the Legislature has provided a remedy for misconduct of this kind, and has taken care that the administration of it shall be under control; the effect of allowing

(¹) 2 J. & H., 517; 31 L. J. (Ch.), 37.

(²) D. F. & J., 221; 31 L. J. (Ch.), 161.

(³) 14 Sim., 405.

such an agreement would be, that any party might take the matter into his own hand, and this would lead to collusion and fraud of a serious nature.

Cur. adv. vult.

Nov. 26. The following judgments were delivered :

KELLY, C.B.: I am of opinion that the plaintiff is entitled to the judgment of the court. The consideration for the promise, as alleged in the plea, is that the deceased would not expose and make public the commission of the crime of adultery which the plaintiff had committed with his wife. I think that it is the breach of a moral duty to declare a man guilty of a crime unless upon a justifiable occasion. Such a declaration or statement in writing, even if true, would be a libel, and subject the author of it to an indictment, unless the publication could be shown to be lawful, as having been made upon a justifiable occasion, or in the ordinary course of a prosecution for an offence against the law. And if this be so, inasmuch as the publication, *not [7 upon any justifiable occasion, that the plaintiff had been guilty of adultery, would have been the breach of a moral duty by the deceased, I am of opinion that the forbearance to commit such a breach of duty cannot be made the consideration for a promise, either to pay a sum of money or to release a debt. The consideration therefore failing, the promise is void and the plea is bad in law.

The case before Wood, V.C. ('), shows that a bond conditioned for the payment of a sum of money, in consideration of giving up and abandoning a petition for a divorce on the ground of adultery, cannot be enforced by the obligee. This shows that a forbearance to sue for a divorce with justifiable cause is no consideration for a promise to pay money. Thus, the forbearance to publish with justifiable cause being no consideration, *a fortiori* such forbearance, where there is no good cause, cannot support a promise.

The plaintiff is therefore entitled to the judgment of the court.

CLEASBY, B.: I am of the same opinion, and will only add a few words. The consideration for the promise to give up a bond must either be a benefit to the promisor or some prejudice to the promisee. What is the benefit in this case? It is the benefit derived from the deceased keeping certain events secret, and that is the same thing as depriving the public of the knowledge of the truth, and of the opportunity of acting upon it. It is only, therefore, a benefit to the plaintiff so far as it would be material to the public to

(') *Gipps v. Hume*, 2 J. & H., 517; 31 L. J. (Ch.), 37.

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know the circumstances. If that is wholly immaterial, then there is no consideration at all; if it is material, then the public ought not to be deprived of it as a matter of bargain which is to be held to confer a legal right. The case of *Pool v. Bousfield* (') has some bearing upon the validity of such a consideration. In that case the consideration was the not further prosecuting an application to the court to compel an attorney to answer the matters in an affidavit. That case, though not actually in point, has this resemblance to the present, that the object was to prevent the disclosure of certain matters affecting the character of the promisor; and although, so far as regards any redress 8] *which the plaintiff might look for from the application, the agreement was perfectly legal, Lord Ellenborough held the agreement to be corrupt and invalid. It is, no doubt, an important feature in that case that the defendant was an attorney, and therefore an officer of the court; and I only refer to it as bearing some resemblance to the present case. The conclusion I have arrived at in the case we are now considering is founded on general principles. The plea is, in my opinion, bad; and our judgment must be for the plaintiff.

AMPHLETT, B., concurred.

Judgment for the plaintiff.

Solicitors for plaintiff: Coode, Kingdon & Cotton, for Thomas Floud, Exeter.

Solicitors for defendant: Peacock & Goddard.

(') 1 Camp., 55.

[Law Reports, 1 Exchequer Division, 8.]

Nov. 26, 1875.

GAMBLES and Others v. THE OCEAN MARINE INSURANCE COMPANY OF BOMBAY.

Ship and Shipping—Policy of Insurance—Insurance on Voyage to Port "and for Fifteen Days whilst there after Arrival"—Termination of Risk.

A vessel insured "from Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival," arrived safely at Newcastle, and completed the discharge of her inward cargo. Being chartered to carry a cargo of coals to Gibraltar, she received a small quantity as stiffening, and was moved to a loading-place on the river Tyne, within the port of Newcastle, to complete her loading. While moored there the vessel, within fifteen days from her original arrival at Newcastle, was injured in a storm. The stamp on the policy was sufficient to cover both a voyage and a time policy:

Held (by Kelly, C.B., and Amphlett, B.; Cleasby, B., dissenting), that the substantial purpose of the insurance being at an end when the loss occurred, the underwriters were not liable.

SPECIAL case stated in an action brought by the plaintiffs on a policy of insurance effected by them with the defendants for the sum of £600.

The ship, valued at £1,500, was insured from the port of "Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival."

*The ship left the port of Pomaron under a charter- [9 party, and arrived on the 4th of December, 1873, in safety at Newcastle. On the 13th of December she completed the discharge of her inward cargo within the port of Newcastle.

On that day the ship was chartered to load in the river Tyne a cargo of coals for delivery at Gibraltar, and having received on board two keels of the same as stiffening, was, on the 15th of the same month, shifted to the Killingnorth Colliery loading place on the river Tyne, there to complete her loading, and was there well and properly moored, head and stern in a tier, to wait her turn to go under the loading spout.

The loading spout is at Wallsend, which is about four miles from the town of Newcastle, in the parish of St Nicholas, Newcastle, and is within the port of Newcastle, and within the district popularly known by and amongst mercantile men as Newcastle.

On the evening of the last-mentioned day it blew heavily from the westward, and for better security, at about 11 p.m., a bower anchor was let go under foot, and the chain ranged upon deck clear for running. On the morning of the 16th the wind increased to hurricane force, and at about 4 a.m., owing to its irresistible violence, the mooring-post on the quay, to which the ship's head-moorings were secured, broke, causing her to become adrift forward and likely to capsize. Thereupon the stern-mooring was instantly cut to facilitate the ship swinging to her anchor, but, notwithstanding this, she quickly capsized, filled, and sank on the same day and alongside the quay.

The ship was subsequently raised, but was found to be very seriously damaged, and the plaintiffs sustained very considerable loss and expense.

It appeared by the policy, which was attached to the case, that the stamp on it amounted to 3s., being at the rate of 3d. per cent. for the voyage and 3d. per cent. on a time policy.

The question for the opinion of the court was, whether the plaintiffs, under the above circumstances, were entitled to recover against the defendants under the policy of insurance in respect of the loss.

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10] *Nov. 17. *Gully*, for the plaintiffs, contended that the loss was covered by the insurance, having taken place within the fifteen days agreed upon by the parties to the policy.

Cohen, Q.C. (*J. H. Crawford* with him), for the defendants: The question is, whether a new voyage having been commenced there was not an alteration of risk analogous to deviation. The insured voyage was completed, and the policy was not intended to cover the new risk. The court ought to carry out what can be collected from the policy to be the intention of the parties, and for that purpose to construe it fairly and liberally: *The Teutonia* ⁽¹⁾.

Gully, in reply: If the phrase has, by the custom of merchants, some other than its natural meaning, that is a question of fact; but what the court is asked to do here is, as a matter of law, to read in the words, "or until the vessel shall have finished her loading, whichever shall first happen."

[*KELLY*, C.B.: Have you considered the cases of *Williams v. Shee* ⁽²⁾ and *Hammond v. Reid* ⁽³⁾, and the class of cases that turn on deviation?]

To import that consideration would be to treat the agreement, as to the insurance lasting for fifteen days, as having reference only to a risk on the cargo. Deviation means the incurring a risk which the parties have not agreed on: here the agreement covered the risk, and the loss is within the policy.

Cur. adv. vult.

Nov. 26. The following judgments were delivered:

KELLY, C.B.: The loss in question is certainly within the literal terms of the condition in the policy, having occurred within fifteen days after the arrival of the ship at Newcastle. But the insurance, even if the policy be deemed a time policy, is, "at and from the port of Pomaron to Newcastle, and for fifteen days whilst there after arrival." It is, therefore, an insurance for that voyage; and it appears to me that, when the cargo was discharged, the voyage was complete [1] and at an end; and although the *ship might within the policy have remained for the whole fifteen days in the port of Newcastle, the proceeding to another part of the port, and there taking on board a portion of a cargo for a new voyage, was in effect the beginning of a new voyage, and a deviation, being foreign to the purposes for which the port of Newcastle might be used for the voyage insured.

⁽¹⁾ Law Rep., 4 P. C., 171.

⁽²⁾ 4 B. & Ald., 72.

⁽³⁾ 3 Camp., 469.

The cases of *Williams v. Shee* ⁽¹⁾ and *Hammond v. Reid* ⁽²⁾ (and vide Arnould on Insurance, 4th ed., p. 443) appear to me to establish the principle, that it is a deviation to resort to or to use the ship, within a port covered by the policy, but for purposes unconnected with the voyage insured.

I think, therefore, that the taking the coals on board at the part of the port in question was as much a deviation as if the ship, after the taking goods on board for a new voyage, had sailed upon such voyage several miles down the river, and been lost within a few yards of its mouth, but within the limits of the port of Newcastle.

It was contended at the bar that this was a time policy, and it appeared that it bore the stamp required for a time policy. But if this were so, it was still a policy upon a voyage from Pomaron to Newcastle, and the taking of a cargo, or part of a cargo, on board for another and a different voyage, was as much a deviation as if, upon a time policy for a year upon voyages between Dover and Newcastle, the ship had gone to Calais and taken a cargo on board there.

I think, therefore, that our judgment must be for the defendants; and my Brother Amphlett concurs in this opinion.

CLEASBY, B.: I cannot agree in the conclusion arrived at by my Lord, because I think the language of the policy is quite clear, and I do not see any reason why the court should depart from it. The language of the policy is "from Pomaron to Newcastle-on-Tyne." That is an ordinary voyage policy; but then it goes on, "and for fifteen days whilst there after arrival." I consider that to be a time policy. Our attention was called, in the course of the argument, to the fact that this policy is stamped as a voyage policy and a time policy expressly. Therefore you have first, *a [12 voyage from Pomaron to Newcastle, which would be subject to deviation, and the usual considerations affecting voyage policies, and then come the words "fifteen days whilst there after arrival," which, I think, plainly constitute a time policy for fifteen days. Those words are not affected, in my opinion, by the fact that there is in the same document an assurance for a voyage policy. I cannot hold this as only intended to cover the time occupied in discharging the cargo, but, so far as any lawful engagement was concerned, to give the assured the benefit of the policy for a period of fifteen days, however employed, whether in doing nothing, or in preparing his vessel for another cargo, or in removing to another part of the port, or taking in cargo

(1) 3 Camp., 469.

(2) 4 B. & Ald., 72.

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for another voyage. It appears, in this case, that what took place was that the captain, having cleared his previous cargo in order to get another, has to go to a place where ships remain in tiers and take their turn at the stage, but in order to clear the port, as he had discharged his cargo, it was necessary his vessel should be stiffened. Instead of ballast, he took two keels of coal on board. Of course he would not take them out afterwards, and they would form part of his future cargo. It appears to me immaterial whether he went in ballast or in coals; the act remains the same; he is lawfully engaged in the ordinary work in which a man would be engaged in that port. During the fifteen days while he was there waiting for his turn at the stage, the weather was such as to cause the loss which has given rise to this action. I cannot myself understand why this case should be regarded differently from time policies generally. It is quite plain, on time policies, the risk incurred is entirely independent of the voyage of the ship, and the policy covers any voyage whatever which the ship may make, and any loss or damage she may sustain by the perils insured against within the space of time limited in the policy. I am reading from p. 349 of Mr. Arnould's work on Insurance, the 4th edition. My learned Brothers think this is not a time policy, in which case the argument as regards those fifteen days is simple and complete; but I cannot agree with them. I think it is clearly a time policy, and therefore the nature of the risk is immaterial, and that being so, as the loss occurred during the time *covered by the policy, and by reason of the perils assured against, the assured are entitled to recover.

Judgment for the defendants.

Solicitor for plaintiffs: *W. W. Wynne, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for defendants: *Freshfields & Williams.*

[Law Reports, 1 Exchequer Division, 18.]

Nov. 22, 1875.

BEESTON V. BEESTON.

Wagering—Check given for share of Winnings—8 & 9 Vict. c. 109, s. 18.

To a declaration on a check, the defendant pleaded that he had delivered the check to the plaintiff in respect of money alleged to be due from the defendant to the plaintiff upon a contract made between them by way of wagering, whereby it was agreed that the plaintiff should pay the defendant certain moneys, and that the defendant should employ them and certain moneys of his own in making bets and wagers upon the result of certain horse races, and should pay to the plaintiff a cer-

tain proportion of the winnings, and that, except as aforesaid, there was no consideration for the check. On demurrer:

Held, that the plea was bad, as the plaintiff was not seeking to recover on any contract or agreement by way of gaming or wagering void under 8 & 9 Vict. c. 109, s. 18.

DECLARATION on a check drawn by the defendant in favor of the plaintiff on the Wilts and Dorset Banking Company and dishonored, and on the common *indebitatus* counts.

Third plea; as to the first count, and so much of the plaintiff's claim under the money counts as related to money alleged to be due upon accounts stated, that the defendant made and delivered the check or order to and the same was received by the plaintiff for and in respect of money alleged to be due from the defendant to the plaintiff upon a contract made between them by way of wagering—that is to say, a contract whereby it was agreed between the plaintiff and the defendant that the plaintiff should pay certain moneys to the defendant, and that the defendant should employ and use such moneys, and certain moneys of his own, in making and laying bets *and wagers upon the result of certain [14 horse races, and that the defendant should, subject to certain terms and conditions agreed upon between the plaintiff and the defendant, pay to the plaintiff a certain proportion of such sums as he should win by betting and wagering on the horse races with the said moneys, and the money so alleged to be due on the contract, and in respect of which the check or order was given, and the accounts stated, was money alleged to have been won upon the said bets and wagers, and, except as aforesaid, there never was any value or consideration for the making or payment of the check or order, or stating the accounts, by the defendant.

Demurrer and joinder.

Purvis, for the plaintiff: The plea is bad. The question turns on 8 & 9 Vict. c. 109, s. 18 ⁽¹⁾. Betting in itself is not illegal, *Fitch v. Jones* ⁽²⁾, *Knight v. Chambers* ⁽³⁾; nor is betting on a horse race, *Johnson v. Lansley* ⁽⁴⁾. In that case one of two persons received money in respect of bets made by them jointly on a horse race, and gave a bill to the other accepted by a third person who was sued; the statute

⁽¹⁾ 8 & 9 Vict. c. 109, s. 18: "That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager,

or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

⁽²⁾ 5 E. & B., 238; 24 L. J. (Q.B.), 293.

⁽³⁾ 15 C. B., 562; 24 L. J. (C.P.), 121.

⁽⁴⁾ 12 C. B., 468.

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was held to be no bar to the action, and the case is directly in point. It is immaterial that the plaintiff was privy to the original transaction, for money has been received to his use, as in *Tenant v. Elliott* ⁽¹⁾, which he is entitled to receive.

W. Graham, for the defendant: This is an attempt to enforce a contract prohibited by statute. The contract was that the defendant should bet and pay the proceeds to the plaintiff. The plaintiff could not have recovered the money independently of the note, and therefore it was given without consideration. This is not like the case of *Sharp v. 15] Taylor* ⁽²⁾, where the distinction *is drawn between enforcing illegal contracts and asserting title to money which has arisen from them; for here the object of the statute was to prevent one of the mischiefs arising from gaming—namely, the employment of one person to bet for another. If this contract is to be held good, it would be good as to money which the defendant had won, whether he had received it or not.

Purvis was not heard in reply.

CLEASBY, B.: I think the argument for the plea that the section in question applies to the relation that exists between the plaintiff and the defendant fails. It is impossible to argue that betting on horse races is illegal in the sense of tainting any transaction connected with it. By the statute certain contracts or agreements are made void, but not illegal. Now the cause of action here, whether on the check or on accounts stated, is that the defendant has received money for which he ought to account, because he has agreed to do so. Why is he not bound to account? It is said that the statute prohibits such an agreement as the present, but all that it professes to deal with are contracts for wagering. The case of *Johnson v. Lansley* ⁽³⁾, in which the transaction occurred after the passing of this statute, does not seem to me to be distinguishable. In that case the only consideration for the bill transaction between the plaintiff and his partner was that the latter had received money, which, as Maule, J., said, he was bound to account for to the plaintiff. There can be no distinction arising from the fact that in this case it was not known to the person with whom the bet was made that the plaintiff and the defendant were interested. I think, therefore, that this is not an attempt to recover under a contract by way of wagering, and that the plaintiff is not precluded from recovering, and that the plea is bad.

⁽¹⁾ 1 B. & P., 3.

⁽²⁾ 2 Ph., 801.

⁽³⁾ 12 C. B., 468.

POLLOCK, B.: I am of the same opinion. There was money in the hands of the defendant belonging to the plaintiff, and, therefore, good consideration for the bill. The statute is directed against suits brought for recovering on any contract by way of *wagering. That applies to [16 actions brought by one party to a wager against the other, or by either party against the stakeholder. The only thing to be said on the other side is that this being a pre-arranged plan, such betting as was in contemplation was illegal, but it was not so at common law, nor by 9 Anne, c. 14, nor 5 & 6 Wm. 4, c. 41, because those statutes only apply to securities between the parties wagering, and the statute 8 & 9 Vict. c. 109, only makes such contracts null and void, and not illegal, as is clearly expressed in *Fitch v. Jones* (').

AMPHLETT, B.: I am of the same opinion. There was nothing illegal in the contract, as stated in the plea. *Sharp v. Taylor* (') goes further than is necessary for the decision of this case, for there the Lord Chancellor decided on the ground that the transaction alleged to be illegal was completed and closed, and would not be affected by what the court was asked to do between the parties. I do not think it is necessary to say whether the defendant could keep the money in his pocket if he won, but I agree that while the statute makes a security given for payment of a bet void, that is not the case here, and the plaintiff is entitled to recover.

Judgment for the plaintiff.

Solicitor for plaintiff: *J. T. Luscombe.*

Solicitors for defendant: *Monckton, Long & Co.*

(') 2 Ph., 801.

(') 5 E. & B., 238; 24 L. J. (Q.B.), 293.

[Law Reports, 1 Exchequer Division, 17.]

• Nov. 15, 1875.

[IN THE COURT OF APPEAL.]

*COPIN V. ADAMSON (').

[17

Foreign Judgment—Liability of English Shareholder in a Foreign Company—Effect of taking Shares—Agreement to submit to Jurisdiction—Service of Notice at elected Domicile.

To a declaration claiming a sum recovered by a judgment in a French court, the defendant pleaded that he was not a native of France, or at any time before judgment resident or domiciled within the jurisdiction of the French court, or served with any process or summons in the suit, nor did he appear therein; nor had he any notice

• (') Affirming 10 Eng. Rep., 492.

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or knowledge of any process or summons, or any proceedings in the suit, or any opportunity of defending himself.

Replication, that the defendant was the holder of shares in a company having its legal domicile in Paris, and thereby became subject to all the liabilities, rights, and privileges attaching or belonging to shareholders, and in particular to the conditions contained in the statutes or articles of association. That by those statutes or articles, it was provided and agreed that all disputes arising during the liquidation of the company between the shareholders of the company, the administrators, the commissioners, or between the shareholders themselves, with respect to the affairs of the company, should be submitted to the jurisdiction of the French court; that every shareholder provoking a contest must elect a domicile at Paris, and in default election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses, &c., should be validly served at the domicile formally or impliedly chosen. That the company became bankrupt, and by the law of France the amount unpaid upon the defendant's shares became payable to the plaintiff as the company's assignee in bankruptcy; that the defendant made default, and provoked a contest; that he never elected a domicile; that the plaintiff thereupon caused a summons to be served at the office aforesaid, which summons required the defendant to appear in the said French court to answer the plaintiff's claim; that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular; and that the defendant was bound to appear, but did not, whereupon the plaintiff recovered judgment by default against him for the amount unpaid on his shares:

Held (affirming the judgment of the Court of Exchequer), that the replication was good, although it did not allege that the defendant ever had any notice or knowledge of the statutes or articles, or of their provisions.

DEMURRER to a replication.

For the present purpose the pleadings are sufficiently set out in the head-note. They are fully stated in the report of the case below (¹), from which it will be seen that the Court 18] of Exchequer * (Kelly, C.B., Pigott and Amphlett, BB.) gave judgment for the plaintiff upon a demurrer to the replication now in question; and Pigott and Amphlett, BB. (Kelly, C.B., dissenting), gave judgment for the defendant upon a demurrer to the second replication, as to which no question now arises.

Error was brought in respect of the judgment upon the first replication alone.

R. E. Webster (H. Matthews, Q.C., with him), for the defendant: If the replication is read to mean that the defendant as shareholder *agreed* to be bound by the statutes or articles relating to the election of a domicile and service of process at an implied domicile, the replication is undoubtedly good; but it cannot bear that construction, for it does not allege that he ever had any knowledge whatever of the statutes or articles, or those provisions. No contract by the defendant is averred; the only allegation is that by the law of France the defendant was bound by the statutes, because

(¹) Law Rep., 9 Ex., 345.

he was a shareholder, and that is not sufficient. No doubt, if the principle established by *Vallée v. Dumergue* ⁽¹⁾ is law, this replication is good, but this court can overrule that decision. Moreover, the statutes provide that service at the implied domicile shall be valid and effectual, but not that all other service shall be dispensed with. The present defendant never had any notice of any kind of the proceedings in the French suit. [He also referred to *Schibsby v. Westenholz* ⁽²⁾, and *Godard v. Gray* ⁽³⁾.]

Benjamin, Q.C., *Holl* and *S. Hastings*, for the plaintiff, were not called on.

LORD CAIRNS, L.C.: The replication appears to me to amount to this, that the defendant was a shareholder in a French company; that the statutes and provisions of that company which, in point of fact, were agreements *inter socios*, provided, among other things, that every shareholder between whom and the rest of the company, or the representatives of the company, litigation should arise, should choose a domicile in Paris, and, if he did not, the public office there should become his domicile *pro hac vice*, and service of all proceedings at that domicile should be good service. The replication goes on to represent that, by the law of France, a person taking shares and becoming an *actionnaire* in the company, was bound by all the statutes and provisions of the company. The question might arise, whether, without any express averment, by the law of France as by that of every civilized country, the shareholder would not be bound by all the statutes and provisions of the company in which he was a shareholder. But that question does not arise here, and I say nothing further about it. The averment is, that by the law of France he was bound by all the statutes and provisions of the company. The Court of Exchequer have held that a good replication. I am clearly of the same opinion. It appears to me that, to all intents and purposes, it is as if there had been an actual and absolute agreement by the defendant; and that, if it were necessary to bring an action against him on the part of the company, the service of the proceedings at the office of the imperial procurator, if no other place were pointed out, would be good service. Therefore, the appeal from the judgment of the court below on the demurrer must fail.

It thus becomes unnecessary to consider the points raised

⁽¹⁾ 4 Ex., 290; 18 L. J. (Ex.), 398.

⁽²⁾ Law Rep., 6 Q. B., 155.

⁽³⁾ Law Rep., 6 Q. B., 139.

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with regard to what took place at the trial (¹), and the appeal upon the rule must be dismissed with costs.

BLACKBURN and BRETT, JJ., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Deane, Chubb & Co.*

Solicitors for defendant: *Miller & Wiggins.*

(¹) The cause was tried at the Guildhall sittings after Hilary Term, 1874, before Kelly, C.B., when a verdict was found for the plaintiff for the amount claimed. A rule *nisi* was afterwards obtained pursuant to leave to enter a nonsuit or a verdict for the defendant, or for a new trial upon several grounds. This rule was discharged by the Court of Exchequer on the 8th of May, 1874, having been argued together with the demur-

rs. From this decision also the defendant appealed, but the questions raised by the rule became immaterial after the decision of the Court of Appeal upon the demurrer, all the allegations in the replication having been proved at the trial. The decision of the Court of Exchequer, discharging the rule, was affirmed, and the verdict therefore stands for the plaintiff.

See 10 Eng. Rep., 503 note.

A state has power to subject *property* of non-residents within its territorial limits to the satisfaction of those who may appeal to her courts against such non-residents by any mode of procedure which it may deem proper and convenient under the circumstances: *Neff v. Pennoyer*, 3 Sawyer, U.S., 274.

A personal judgment or decree against one who has never been served with process or appeared in the cause is a mere nullity and cannot be made the basis of an equitable remedy. Such an infirmity in the judgment is available as a defence to others than the judgment debtor alone; his creditors can gain no rights against third parties by his default or stipulation; and none but judgment creditors can call upon one to whom their debtor has conveyed, even though for the express purpose of defrauding them, to respond to their bill in equity: *Tyler v. Peatt*, 30 Mich., 63.

The only effect of a judgment rendered in another state, in proceedings by attachment against the property and effects of non-residents of such state, or *in rem*, without any appearance by defendants, is to bind the property found in the state under the laws of which such judgment is rendered. For all purposes of proceeding against the person, such a judgment is a mere nullity: and cannot be sued on as a judgment *in personam*, even in the courts of the same state.

And such a judgment being so far

void that no action can be maintained upon it as a judgment against the defendants therein, it forms no obstacle to a recovery here upon the original demand: *FitzSimmons v. Marks*, 66 Barb., 333; *Schwinger v. Hickok*, 53 N. Y., 281; *Noble v. Thompson*, etc., 79 Penn. St., 354.

Where, in an action for tort against a non-resident, the summons is served by publication, and judgment is perfected without an appearance of the defendant, the judgment is not *in personam*, and proceedings under section 292 of the Code cannot be instituted against defendant to compel him to submit to an examination concerning his property; nor is the plaintiff entitled to a warrant for his arrest, as prescribed by said section, on account of his refusal to apply property in satisfaction of such judgment: *Bartlett v. McNeill*, 60 N. Y., 53.

A judgment in such a case was perfected in the ordinary form upon an assessment of damages by a sheriff's jury. Upon motion of defendant the judgment was amended by inserting a statement that the defendant "was a non-resident upon whom no personal service was made, but who had property within the state liable to attachment." The order thereon was affirmed on appeal to the General Term. On appeal from the order of the General Term, held, that the amendment did not change the character or force of the judgment; that the Court of Appeals could not, upon such an appeal,

determine the validity of the judgment, or whether it could be enforced against any property of the defendant in the state: *Bartlett v. McNiell*, 60 N. Y. Rep., 53.

The want of jurisdiction of a foreign court may always be shown though jurisdiction be recited by the record: *Pennywit v. Foote*, 27 Ohio St. Rep., 600; *Eager v. Stover*, 59 Missouri, 87; *Macomber v. Peck*, 39 Iowa, 351; *Hall v. Lanning*, 91 U. S. Rep., 160, 8 Chic. Leg. News, 145; *Rossier v. Westbrook*, 24 Upper Can. Com. Pl., 91. See 1 Southern Law Rev., N.S., 662.

So in certain cases of a domestic court: *Martin v. Parsons*, 49 Cal., 94; *Harshay v. Blackman*, 20 Iowa, 161; *Bryant v. Williams*, 21 Iowa, 329.

If the party avail himself of the invalidity within a reasonable time after notice of the judgment: *Macomber v. Peck*, 39 Iowa, 351.

After the dissolution of a firm one partner has no implied authority to cause the appearance of another partner to be entered to a suit brought against the firm: *Hall v. Lanning*, 91 U. S. Rep., 160, 8 Chicago Leg. News, 145; *Rossier v. Westbrook*, 24 Upper Can. Com. Pl., 91.

Though one defendant may be authorized to procure an attorney to enter an appearance for a co-defendant, or one may be entered under a power of attorney, when the judgment will be valid: *Stewart v. Hibernian*, etc., 78 Ills., 596.

Though the party denying jurisdiction of a foreign court must plead facts excluding its jurisdiction: *Maubourquet v. Wyse*, Irish Law Rep., 1 Com. Law, 471.

The statutes of some of the states (as Laws N. Y., 1853, chap. 463, §§ 14, 15, pp. 892-3, 4 Edm. St., 221, 223; Laws 1853, chap. 466, § 23, p. 915, 4 Edm. St., 237, as amended 1875, p. 624) require that foreign insurance companies as a condition of doing business therein shall appoint an agent or attorney within the state upon whom process may be served. A judgment rendered upon service upon such agent or attorney is a judgment *in personam*: See 14 Eng. Rep., 441-2 note; *Gibbs v. Queen Ins. Co.*, 63 N. Y., 114; *Ins. Co. v. Morse*, 20 Wall., 445.

In such case a suit may be removed to the federal courts by the defendant, and the latter court obtains jurisdiction *in personam*: *Lee v. Aetna Ins. Co.*, 3 Western Law Monthly, 404, U. S. Dist. Court Northern Dist. Ohio, *Willson, J.*; *Ins. Co. v. Morse*, 20 Wall., 445.

A state may impose such conditions as it pleases upon the transaction of business by a foreign corporation, except that it may not deprive the federal courts of jurisdiction: *Doyle v. Continental Ins. Co.*, 15 Alb. L. J., 267; 14 Eng. Rep., 441-2 note; *Thorne v. Travelers*, etc., 80 Penn. St., 15; *Railway*, etc., *v. Pierce*, 27 Ohio St. R., 155; *Newburgh v. Weare*, 27 Ohio St., 343; *Ins. Co. v. Morse*, 20 Wall., 455-8.

[Law Reports, 1 Exchequer Division, 20.]

Nov. 26, 1875.

*ELEY V. THE POSITIVE GOVERNMENT SECURITY LIFE [20] ASSURANCE COMPANY, LIMITED.

Company—Articles of Association—Appointment of Solicitor—Statute of Frauds—Contract not to be performed within a Year—Signature to articles.

Articles of association contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company for the usual and accustomed fees and charges, and should not be removed from his office unless for misconduct. The articles were signed by seven members of the company, and were duly registered, and the company incorporated under the Companies Act, 1862. The plaintiff was not appointed solicitor to the company by any resolution of the directors, nor by any instrument bearing the corporate seal of the company, but he acted as such for some time. No resolution as to his ceasing

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to be solicitor was ever passed by the directors, but after a time they ceased to employ him, and employed other solicitors to do the legal business of the company.

The plaintiff brought an action against the company for breach of contract in not employing him as solicitor, to transact their legal business, on the terms of the articles :

Held, by Cleasby and Amphlett, BB., that the articles of association were a contract between the shareholders *inter se*, and did not create any contract between the plaintiff, who was not a party to them, and the company.

Held, also, by Kelly, C.B., Cleasby and Amphlett, BB., that even if such a contract as the plaintiff alleged had been entered into, it would be a contract not to be performed within a year, and must, therefore, be in writing, and that the signatures to the articles of association, which were affixed *alio intuitu*, were not signatures to a memorandum of the contract within the Statute of Frauds, so as to bind the company.

On an award stated in the form of a special case the following facts appeared :

In the year 1869, one Baylis, who was endeavoring to form a joint stock insurance company upon a new principle, applied to the plaintiff to make advances to the extent of £200 to meet the expenses of getting up and forming such a company, and it was arranged between the plaintiff and Baylis that, in the event of the plaintiff making such advances and the company being formed, the plaintiff should be appointed permanent solicitor to the company. The defendant company was formed, and the plaintiff made advances to the [21] extent of £200. The money was paid to *Baylis, and by him applied to purposes of the company. The last of the advances was made in May, 1870.

The memorandum and articles of association of the company were prepared by the plaintiff and signed by seven persons, each holding five shares, and were duly registered on the 27th of January, 1870, pursuant to the Companies Act, 1862.

Clause 118 of the articles of association was as follows :

“Mr. William Eley, of No. 27 New Broad Street, in the city of London, shall be the solicitor to the company, and shall transact all the legal business of the company, including parliamentary business, for the usual and accustomed fees and charges, and shall not be removed from his office except for misconduct.”

In December, 1870, the company allotted to the plaintiff 200 shares, and the plaintiff accepted the same in repayment of his advances, and so became, and has ever since been, a member of the company.

From the time of the incorporation of the company down to the latter end of 1871 the plaintiff was employed by the company as their solicitor, and transacted all their legal business except some which was transacted by a firm of solicitors in Manchester in or about October, 1871, and

which formed the subject of a correspondence between the plaintiff and the directors, to which it is unnecessary to advert further than to state that the plaintiff insisted upon his right to be employed as the sole solicitor of the company, and to transact all their legal business unless he misconducted himself; but he intimated that he would not stand upon what he considered his strict right as regarded the business which had been so transacted by the Manchester firm. The directors, on the other hand, insisted that the plaintiff was in error, and that he had no such rights as he alleged.

On the 2d of February, 1870, at a meeting of the directors, a resolution was passed appointing Mr. Baylis permanent out-door manager of the company, subject to removal only on breach or neglect of duty, at a certain annual salary, and with a commission. In the minute of the proceedings at that meeting there is the following entry: "Mr. Eley, solicitor to the company, present."

*No resolution was ever passed by the directors appointing the plaintiff as solicitor to the company, neither was he ever appointed as such at any meeting of the company, nor by any instrument bearing the corporate seal of the company.

Early in the year 1871 the directors published a prospectus of the company, in which the plaintiff's name was inserted under the head "Solicitor." *

Subsequently they published other prospectuses, in all of which, under the head of "Solicitors," several names appeared, but the plaintiff's name appeared in two only.

The plaintiff from time to time protested against the appointment of any person besides himself as solicitor of the company, nevertheless the company, by their directors, in and after January, 1872, employed several of the persons whose names appear on the various prospectuses to transact legal business for them, but they had not employed the plaintiff to transact any business for them since the year 1871.

The first count of the declaration stated that it was agreed by and between the plaintiff and the defendants that the plaintiff should be employed by the defendants as, and appointed by the defendants to the office of, solicitor of the company upon the terms that the defendants would, so long as the plaintiff should continue to act as and hold the office of solicitor of the company, employ the plaintiff to transact all the legal business of the company for the usual and accustomed fees and charges, and that the plaintiff should not

be removed from his office unless for misconduct. Averments that the plaintiff in pursuance of this agreement became and was employed by the defendants, and entered upon his office as the solicitor of the company upon the terms aforesaid, and was ready and willing to perform the agreement on his part; and of performance of conditions precedent. Breach, that the defendants refused, whilst the plaintiff was solicitor of the company, to employ him as such solicitor as aforesaid, and to suffer and allow him to transact the legal business which the defendants needed to have done and performed, and employed other solicitors to transact the same.

The question for the opinion of the court was, whether, 23] upon *the facts and documents, there was any evidence to support this count of the declaration.

Nov. 10. *D. Kingsford*, for the plaintiff: If the clause of the articles was an actual appointment of the plaintiff, the agreement averred in the declaration is supported by evidence. By the Companies Act, 1862, s. 16, the articles bind the company as if each member had signed; and the case of *Orton v. Cleveland Fire Brick and Pottery Co., Limited* ⁽¹⁾, shows that the company might make this contract. This is not the case of an authority to enter into a contract given by the articles, but of the actual contract contained in them: *Appletreewick Lead Mining Co.* ⁽²⁾; *Lord Claud Hamilton's Case* ⁽³⁾. Even if the article is not in itself a contract, the plaintiff was employed on the terms of it.

Finlay (Day, Q.C., with him), for the defendants: The contract declared on is not that in the articles. In the latter case the company, if liable, would be liable once for all for dismissing the plaintiff. In the former it would render them open to actions from time to time for not sending him work. The articles will not in themselves constitute a contract between the company and third parties, as they relate only to the relations of the members *inter se*. *Melhado v. Porto Alegre Ry. Co.* ⁽⁴⁾ is conclusive on this point; see also *Pritchard's Case* ⁽⁵⁾. Further, there is no evidence from which it can be inferred that the plaintiff was employed on the terms of the article. To prove that, the plaintiff would have to show that, when he was employed by the directors, they had in view that he was their permanent solicitor under this article. Supposing the company had sued the plaintiff

⁽¹⁾ 3 H. & C., 868.

⁽²⁾ Law Rep., 18 Eq., 95.

⁽³⁾ Law Rep., 8 Ch., 548.

⁽⁴⁾ Law Rep., 9 C. P., 503.

⁽⁵⁾ Law Rep., 8 Ch., 956.

for refusing to do some work, could they have recovered? Lastly, the contract alleged is one of a permanent nature, which requires a memorandum in writing within the statute of frauds: *Boydell v. Drummond* ⁽¹⁾; *Birch v. Earl of Liverpool* ⁽²⁾; and notes to *Peter v. Compton* ⁽³⁾.

Kingsford, in reply: The articles signed by the subscribers are a sufficient memorandum. The Companies Act, 1867, s. 37, *provides various ways in which directors [24 may contract, but these are in addition to the ordinary ways: *Wilson v. West Hartlepool Harbor and Ry. Co* ⁽⁴⁾. Further, the employment of the plaintiff so long as he conducts himself well is not necessarily continuous. *Knowlman v. Bluett* ⁽⁵⁾ is an authority that this is not an agreement not to be performed within a year.

Cur. adv. vult.

Nov. 26. The following judgments ^(*) were delivered:

AMPHLETT, B.: In this case the plaintiff, a solicitor, by the first count in his declaration alleged that it was agreed between him and the defendants, who are a company registered under the Joint Stock Companies Act, 1862, that he should be employed by the defendants as, and appointed by the defendants to the office of, solicitor of the company, upon the terms that the defendants would, so long as the plaintiff should continue to act as and hold the office of solicitor to the defendants, employ the plaintiff to transact all the legal business of the company, for the usual and accustomed fees and charges, and that the plaintiff should not be removed from his office unless for misconduct.

On the trial the case was referred to the arbitration of Mr. Manisty, who made his award in the form of a special case, and submitted the following question for the opinion of the court, viz.: "Whether, upon the facts and documents which he had stated or referred to, there was any evidence to support the first count in the declaration?"

These facts and documents I need not detail at length, but so far as is necessary to make clear the grounds of my opinion they were shortly these:

In the year 1869 one Mr. Baylis was an active promoter of the defendants' company, and prevailed upon the plaintiff to make advances to the extent of £200 to meet the expenses of getting up the company, under an arrange-

⁽¹⁾ 11 East, 142.

⁽²⁾ 9 B. & C., 392.

⁽³⁾ 1 Sm. L. C., 335, 7th ed.

⁽⁴⁾ 2 D. J. & S., 475; 34 L. J. (Ch.), read.

⁽⁵⁾ Law Rep., 9 Ex., 1, and in Ex. Ch., 307.

^(*) The judgment of Amplett, B., was

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ment that, in the event of the company being formed, the plaintiff should be appointed permanent solicitor to the company.

25] *This sum of £200 was advanced at different times by the plaintiff to Mr. Baylis, and by him applied to the purposes of the company. The last of such advances was made in the month of May, 1870, a few months after the incorporation of the company, and in the month of December, 1870, the company allotted to the plaintiff 200 shares of £1 each, which he accepted in discharge of his advance, and has ever since been a member of the company.

The memorandum and articles of association of the company were prepared by the plaintiff, and after being signed by seven persons for five shares each (of whom Mr. Baylis was not one) were duly registered on the 27th of January, 1870, pursuant to the Companies Act, 1862.

The articles contained the following clause (No. 118):

"Mr. William Eley, of No. 27 New Broad Street, in the city of London, shall be the solicitor to the company, and shall transact all the legal business of the company, including parliamentary business, for the usual and accustomed fees and charges, and shall not be removed from his office unless for misconduct."

After the incorporation of the company many other persons, besides the seven persons above mentioned, took shares in and became members of the company. The precise time of their becoming members is not stated, nor, in my view, is it material.

From the time of the incorporation of the company down to the latter end of 1871, the plaintiff was employed by the company (no doubt through the directors) as their solicitor, and transacted all their legal business, except some matter transacted by a firm of solicitors at Manchester in or about October, 1871, which formed the subject of a correspondence between the plaintiff and the directors, in which he asserted and they denied his right to be employed as the sole solicitor of the company.

At a meeting of the directors on the 2d of February, 1870, (being probably their first meeting), a resolution was passed appointing Mr. Baylis permanent out-door manager of the company.

In the minute of the proceedings at that meeting there is the following entry, "Mr. Eley, solicitor to the company, present," but no resolution was ever passed by the directors, 26] at that or any other *meeting appointing the plaintiff a solicitor to the company, or arranging the terms of his em-

ployment. Neither was he ever appointed as such at any meeting of the company or by any instrument bearing the seal of the company.

Early in the year 1871 the directors published a prospectus of the company in which the plaintiff's name was inserted under the head, "solicitor."

Subsequently, in the same year, they published another prospectus in which the name of the plaintiff and a firm at Manchester were inserted under the head, "solicitors."

In 1872 they published two other prospectuses in which several names appeared under the head "solicitors," but not the plaintiff's.

Subsequently, in the same year, they published two other prospectuses in which, under the head of "solicitors," the plaintiff's name appears, along with the names of several other solicitors.

The plaintiff from time to time protested against the appointment of any person other than himself as solicitor of the company. Nevertheless the company, by their directors, in and after January, 1872, employed several of the persons named in the prospectuses, but they have never employed the plaintiff to transact business for the company since 1871.

The present action was commenced on the 8th of February, 1873.

Under these circumstances it could not, in my opinion, be successfully contended that the 118th clause of the articles of association created any contract between the plaintiff and the company.

The articles, taken by themselves, are simply a contract between the shareholders *inter se*, and cannot, in my opinion, give a right of action to a person like the plaintiff, not a party to the articles, although named therein. If authority were wanted for this proposition, the cases cited in the argument, *Pritchard's Case* (¹), and *Melhado v. Porto Alegre Ry. Co.* (²), are, in my opinion, quite conclusive on the subject; nor is there any room for the application of the doctrine of ratification, since the arrangement between the plaintiff and Mr. Baylis is not noticed in the articles, and is not found in the case to have been at any time communicated or *known to a single shareholder or director, or, [27 except themselves, to any officer of the company.

This being so, and the contract sued upon not being under the seal of the company, it is not binding upon the company, unless it falls within the 37th section of the Companies Act,

(¹) Law Rep., 8 Ch., 956.

(²) Law Rep., 9 C. P., 503.

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1867 (30 & 31 Vict. c. 131), that is to say, unless it was made by the directors under the express or implied authority of the company.

Now it cannot, in my opinion, be denied that such a contract (if in fact entered into) was most improvident and prejudicial to the company. It is one thing to have it stipulated as between the shareholders that the plaintiff should not be removed from the office of solicitor unless for misconduct (a stipulation which might be disobeyed if found inconvenient, without exposing the company to any action, and which, moreover, might at any time be revoked by a statutable majority of the shareholders), but quite another thing to have a binding contract to that effect with the plaintiff, which would irrevocably bind the company to employ the plaintiff as their sole solicitor during the whole of his professional life, unless actual misconduct could be proved against him.

Many cases might be put, in which the prohibition against employing another solicitor might be most inconvenient and, indeed, disastrous to the company. If taken literally, the company could not employ a solicitor to tax the plaintiff's bill or inquire into his personal conduct, without exposing themselves to an action.

Still, considering the very extensive powers given to the directors by these articles, and the enlarged views of the implied powers of directors which the courts have of late years adopted, I am not prepared to say that such a contract, if in fact entered into by the directors, *bona fide*, would be beyond the scope of their authority, and not binding upon the company; and, at all events, I do not rest my judgment upon it. But, do the facts found by the case prove conclusively (and, undoubtedly, in a case like this between the directors and their solicitor, the strictest proof should be required), that any such special contract was entered into? No written document passed between them, nor is there any entry or notice of such special contract in the minute book of the directors or in any book of the company. All that appears is that the directors allowed the plaintiff to 28] attend their first meeting, and *afterwards employed him as the solicitor of the company, which, as between themselves and the company, though not as between themselves and the plaintiff, they were bound by the articles to do. But how does that show that they entered into a special contract with him, that he should not only receive the ordinary remuneration for his services, but transact all the future business of the company, and not be removed from his office

unless for misconduct? At the same meeting, when the plaintiff attended as solicitor, and must be taken to have been recognized and employed as solicitor of the company, an entry was made in the minute book of the appointment of Mr. Baylis as permanent out-door manager of the company; why was there not an entry made of this special and most onerous contract with the plaintiff? I think it highly probable that the true explanation is that the plaintiff, who prepared the articles and inserted the 118th clause in his own favor, thought he was safe under the clause itself, and therefore did not think it necessary, and, it may be, for many reasons, not for his own interest, to ask the directors to enter into any such strange and special contract with him. He was, however, in my judgment, mistaken in that respect; but, of course, such mistake cannot create any special contract between him and the company, or between him and the directors. All that can be said is that he intended that the company should be bound hand and foot to himself, but from a mistaken view of the law he has, most fortunately for the company, failed to carry such intention into effect. The act of the directors in employing another solicitor was, no doubt, as between themselves and the company, a violation of the 118th clause; but that might have been condoned by the company, and if the plaintiff, as a member of the company, had called that act into question at a general meeting, I do not think it difficult to guess what the result would have been. For these reasons, I think that there was no contract at all between the plaintiff and the company to the effect stated in the declaration. Moreover, if there was in fact any such special contract, it was at all events a contract by parol only; and it was urged before us by the learned counsel for the defendants that it was a contract not to be performed within a year, and therefore within the 4th section of the Statute of Frauds, and I have not been able *to see any sufficient answer to that objection. It [29] seems to me that the parties contemplated that the contract should continue to be binding, at least as against the company, during the whole professional life of the plaintiff; and the circumstance that the contract might be determined within the year by the death, or retirement, or misconduct, or at the will of the plaintiff, would not, in my judgment, prevent the operation of the statute. The case of *Roberts v. Tucker* (¹), and many other cases to be found in the books, establish, I think, that proposition.

The case of *Knowlman v. Bluett* (²), cited on this point

(¹) 3 Ex., 632.

(²) Law Rep., 9 Ex., 1, and in Ex. Ch., 307.

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for the plaintiff, has, I think, no application. There the contract was by a father to pay to the plaintiff an annuity, for so long as she should maintain her illegitimate children by him. The contract was held by the majority of the judges to be revocable by either party, and it was held that the statute was no bar to her recovery of the annuity for the time she actually maintained the children. It is no authority for the proposition that, if the contract had been for the payment of the annuity during the minority of the children, with no power to the father to remove them, it would not have been within the operation of the statute.

It was argued that the articles of association containing the 118th section, being signed by the directors, was a sufficient memorandum or note of the agreement to satisfy the statute. I think there is nothing in that argument. The articles merely regulated the internal affairs of the company, and the signature of the directors ⁽¹⁾ was for the purpose of binding them to such regulations, and cannot possibly, in my judgment, be used as evidence of a subsequent parol agreement between them and a third person.

Upon the whole, I think that the question submitted to us by the learned abitrator ought to be answered in the negative.

CLEASBY, B.: I agree in the result arrived at by my Brother Amphlett, but I prefer to confine my judgment to 30] the last points *raised. I may say that I am of opinion that clause 118 of the articles cannot by itself be taken to operate as a contract between the solicitor and the company. It is said, however, that there is evidence, from what took place subsequently, to show the existence in point of fact of such a contract. Supposing this to be established, we have to consider whether it is a contract not to be performed within a year within the 4th section of the Statute of Frauds. The statute extends to all contracts not to be finally carried out in a year, but it does not extend to contracts which are to be carried into effect on a contingency. We have then to construe the terms of the 118th article. They are, that the plaintiff shall transact all the legal business of the company, and shall not be removed from the office of solicitor except for misconduct. Was this a matter which was not to be carried into effect in a year? It was intended that he should conduct, as long as the defendants continued as a company, all the legal business which they had to transact; and this

(1) By the 83d article the first directors were to be appointed by the subscribers of the memorandum of association, and by the 84th, until such appointment, the subscribers were to be deemed to be directors, and were to exercise all the powers of directors.

seems to me not to be a contract to be carried into effect in the course of a year. The only other question to be dealt with is that as to the signatures to the articles of association. All that the persons who signed did was done with no intention to bind the company to the plaintiff, and, indeed, before any agreement was made between them. We cannot treat that as a signature of a note or memorandum of what was done afterwards, and, therefore, on this point also the plaintiff fails.

KELLY, C.B.: I also think the defendants are entitled to the judgment of the court. I forbear to pronounce any opinion as to whether these articles, with the fact of the subsequent employment, constitute a contract on the terms contained in them, because, were I to so hold, there would be a difficult question behind, whether it was not *ultra vires* for the directors to attempt to bind the company to employ a solicitor to transact, for all his life, all the legal business of the company. Passing by this, I come to consider the objection raised under the 4th section of the Statute of Frauds. I do not see how any one can doubt that this agreement was not to be performed within a year. It was for the life of the plaintiff, subject to a defeasance on the possibility of his being guilty of some misconduct. But, assuming, as I think we must, *that this was not to be performed in a [31] year, the question arises, whether there is any memorandum or note in writing of it signed by the defendants. The signatures affixed to the articles were *alio intuitu*, and it can hardly be suggested that the directors had any idea that, in signing the articles, they were signing a note of this contract. In my opinion, therefore, this not being a memorandum of a contract between the company, or the directors on their behalf, and the solicitor, there is nothing to satisfy the statute, and there is no binding contract on which the plaintiff can recover.

Judgment for the defendants.

Solicitor: *The plaintiff in person.*

Solicitors for defendants: *Trucker, New & Langdale.*

See 12 Eng. Rep., 154 note.

A corporation when organized is not, *per se*, liable upon an antecedent contract by its promoters though it may ratify, become bound thereby, and sue thereon: *Currier v. Ottawa*, etc., 30 Upper Can. Q. B., 61; *Bell's Gap*, etc., v. *Christy*, 79 Penn. St. R., 54; *Ashulot*

Boot, etc., v. *Hoit*, 56 N. H., 548, and numerous authorities cited.

And where after the completion of the incorporation the creditor accepts the obligation of the incorporation, it operates as a novation and payment of a claim against the shareholders individually: *Brewster v. Chapman*, 19 Lower Can. Jur., 301.

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Harris v. Mulkern.

[Law Reports, 1 Exchequer Division, 81.]

Nov. 26, 1875.

HARRIS V. MULKERN and Another.

Ejectment—Action for Mesne Profits—Estoppel—Common Law Procedure Act, 1852
(15 & 16 Vict. c. 76), ss. 180, 207, sched. A, Nos. 14, 17.

To trespass for mesne profits the defendants pleaded title to the lands in themselves during the time for which mesne profits were claimed. The plaintiff replied, by way of estoppel, as to so much of the mesne profits as had accrued since a certain day named, that he sued out a writ of ejectment, for the purpose of recovering possession of the lands, wherein he claimed to be entitled from such day, and that thereupon such proceedings were had that he recovered the lands and possession of them. On demurrer:

Held, that the judgment in ejectment did not operate as an estoppel with respect to the duration of the plaintiff's title, and the replication was therefore bad.

To A declaration in trespass for mesne profits the defendants pleaded, 1st, except as to so much of the declaration as related to the trespasses and causes of action which were committed and arose on and after the 3d of August, 1874, that the messuage and lands were not the plaintiff's as alleged: and, 2d, except as aforesaid, that before the committing by the defendants of the grievances in the declaration complained of, the plaintiff, by deed, demised the messuage and lands to one George Hill for the term of fourteen years from the 25th of March, 1868, by virtue of which demise Hill entered upon the messuage and lands, and 32] *became possessed thereof for and during the continuance of that term, and before the committing of the grievances as aforesaid, Hill, by deed, dated the 6th of May, 1868, demised the messuage and lands to the defendants, for all the residue of the term of fourteen years, except the last three days thereof, by virtue of which last-mentioned demise the defendants entered upon the messuage and lands, and became possessed thereof for the term last aforesaid: whereupon the defendants, in their own right, committed and did the alleged acts and trespasses.

Replication to these pleas, so far as the same relate to trespasses committed on and since the 25th of December, 1867, that the defendants ought not to be admitted to plead either of them, because on the 3d of August, 1874, the plaintiff, for the purpose of recovering possession of the messuage and lands, sued out of this court a writ of ejectment directed to the defendants and one Swann by name, and to all persons entitled to defend the possession of the messuage and lands, to the possession whereof the plaintiff claimed by the writ to have been entitled on and since the

25th of December, 1867, and to eject all other persons therefrom, commanding the defendants and other persons named in the writ, and the persons entitled to defend the possession of the lands or such of them as denied the alleged title of the plaintiff within sixteen days after service of the writ, to appear in this court to defend the property or such part thereof as they might be advised, in default whereof judgment might be signed, and they turned out of possession, and such proceedings were thereupon had in this court upon the writ, that, before this suit, by the judgment of this court, it was considered that the plaintiff should recover possession of the messuage and lands, and afterwards and before this suit, by virtue of such judgment the plaintiff entered into possession of the messuage and lands, and this the plaintiff is ready to verify, &c.

Demurrer to the replication and joinder.

Nov. 17. *Bradford*, for the defendants: The replication is bad. Formerly, no doubt, the judgment in ejectment was an estoppel: *Aslin v. Parkin* ⁽¹⁾; but that arose from the character of the *fictions on which the action was [33 founded. The distinction was pointed out by Cleasby, B., in *Pearse v. Coaker* ⁽²⁾, that, under the old practice the judgment was that the plaintiff should recover "the term," and that was evidence of title from the day of the demise, but that now the judgment is merely for recovery not of the term but of the premises. Even under the old form it is submitted that a judgment that the plaintiff should recover the term was not final as to his title to that term. In *Kenna v. Nugent* ⁽³⁾ a judgment by default in ejectment under the Common Law Procedure Amendment Act (Ireland), 1853 ⁽⁴⁾, was held not to be an estoppel.

Finlay, for the plaintiff: There is no difference in the effect of a judgment in ejectment by default and one after appearance. The finding of the jury in the latter case is that the plaintiff is entitled to the possession of the land "as in the writ mentioned:" Common Law Procedure Act, 1852, sched. A, form 17; and the judgment is to have the same effect as a judgment in the action of ejectment formerly in use, s. 207. The question in issue is stated in s. 180, and is whether the statement in the writ of the title of the claimant is true or false. The plaintiff must prove title from the day named in the writ, and the judgment, being

⁽¹⁾ 2 Burr., 665.

⁽³⁾ Ir. Rep., 6 C. L., 547, and in Ex.

⁽²⁾ Law Rep., 4 Ex., at p. 101.

Ch., Ir. Rep., 7 C. L., 464.

⁽⁴⁾ 16 & 17 Vict. c. 113.

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founded on his right as from that day, is conclusive. In *Kenna v. Nugent*⁽¹⁾ the judgment shows that the issue under the Irish act is, whether the plaintiff was entitled on the day named in the writ or on any day between that day and the issuing the writ⁽²⁾. If the contention of the defendant is right, the judgment is not even *prima facie* evidence of title: *Wilkinson v. Kirby*⁽³⁾ is an authority for the plaintiff.

Bradford, in reply: In *Wilkinson v. Kirby*⁽⁴⁾ the judgment in ejectment was treated as an estoppel from the date 34] of the writ. *Here, however, the replication goes beyond that and treats the judgment as an estoppel from the day named in the writ.

Cur. adv. vult.

Nov. 26. The judgment of the court (Kelly, C.B., Cleasby and Amphlett, BB.) was read by

CLEASBY, B.: This was an action for mesne profits. The plaintiff had recovered in ejectment against the defendants, upon a writ bearing date the 3d day of August, 1874, in which he claimed, in conformity with the form of the writ given by the Common Law Procedure Act, 1852, to have been entitled from the 25th of December, 1867.

The defendants had suffered judgment by default in the ejectment, and in the action for mesne profits they paid into court the amount as from the date of the writ of ejectment; and as to the claim for mesne profits for that portion of the time between the day named in the writ and the date of the writ, they pleaded a plea showing title to the land in themselves. The plaintiff replied by way of estoppel, setting forth the writ of ejectment and judgment. The question is, whether the defendants are estopped by the judgment from denying the title of the plaintiff during the interval between the 25th of December, 1867, and the 3d of August, 1874. It is admitted that they can show that they were not in possession during any part of the term; but the question is whether they can deny the plaintiff's title.

It had been decided that, before the Common Law Procedure Act, upon the old form of declaration, laying the

⁽¹⁾ Ir. Rep., 6 C. L., 547, and in Ex. Ch., Ir. Rep., 7 C. L., 464.

⁽²⁾ The Com'n Law Procedure Amendment Act (Ireland), 1853 (16 & 17 Vict. c., 113), sched. B, form No. 20, gives the question for the jury thus: "Therefore let a jury try whether the plaintiff was entitled to the possession of the said

lands or any part of them, on the said day, or at any time subsequent to such day, and before the commencement of the action, and whether the plaintiff is entitled to any and what damages for loss of mesne rates and profits."

⁽³⁾ 15 C. B., 430; 23 L. J. (C.P.), 224.

demise by the lessor of the plaintiff and a particular term, the defendant, if judgment went against him, was precluded from denying the plaintiff's title from that time. By the old form of declaration, the plaintiff claimed a certain term in the premises, dating from that day, and the judgment of the court was that he should recover the term.

This judgment bound the defendant, and he could not be allowed to dispute it. It was contended in argument that the judgment only was that the plaintiff should recover the term, and that this was not equivalent to a judgment that he was entitled to the term; but we think there is no ground for this argument, *and that the judgment in ejectment [35 was a binding judgment as to the title and the term between the parties.

It was also considered under the old practice that the judgment was equally binding whether by default or after verdict. It is only necessary to refer to *Aslin v. Parkin* (¹), and *Wilkinson v. Kirby* (²). We have now to consider what is the effect of the judgment by default in the action of ejectment under the Common Law Procedure Act. By the form of the writ given by the act, the plaintiff may either claim title from the date of the writ or from some anterior day. This, we think, was no doubt done to enable the plaintiff to make the writ available in the action for mesne profits. In the present case the writ claimed title from some anterior day, as has been already stated.

The course of proceeding now is, that all that the plaintiff claims by the writ is possession of the land, not possession of any term in the land, and that the judgment of the court, as given by sch. A to the Act, No. 14, is merely that the plaintiff "do recover possession of the land in the writ mentioned." In connection with this it should be noticed that the effect of non-appearance as stated in the writ of ejectment is, that judgment may be signed and the defendant turned out of possession.

The distinction between the present and the former judgment has been already pointed out in the case of *Pearse v. Coaker* (³) and in the case of *Kenna v. Nugent* (⁴). The case in the Irish court was not a decision bearing upon the present case, because by the Irish Common Law Procedure Act, 1853, a form of issue is given which makes the day from which the title is laid in the writ immaterial, as the form given is to try whether the plaintiff was entitled from that

(¹) 2 Burr., 665.

(⁴) Ir. Rep., 6 C. L., 547, and in Ex.

(²) 15 C. B., 430; 23 L. J. (C.P.), 224. Ch., Ir. Rep., 7 C. L., 464.

(³) Law Rep., 4 Ex., at p. 101.

day or from any subsequent day, which is not the case in our proceedings. In our proceedings, if the case went to trial upon such a writ as the present, the question would be, whether the plaintiff was entitled at that time, and the plaintiff would fail unless he proved that title, subject of course to an amendment of the writ: s. 180 of the Common Law Procedure Act, 1852.

36] *We ground our judgment in the present case, where the strict question of estoppel is raised, upon the distinction between the present form of judgment and the former one. We think that, as the only judgment now is that the plaintiff recover possession of the land, this is only an estoppel as to the plaintiff's title at the time action was brought, and there is nothing in it either expressly or by reference which can make it operate as a complete estoppel with reference to the duration of the plaintiff's title; there is of course another question, to what extent it is evidence.

For the above reasons we think the replication by way of estoppel cannot be supported, and that the demurrer must be allowed, and judgment upon it, for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Denton, Hall & Barker.*

Solicitor for defendants: *J. P. Poncione.*

[Law Reports, 1 Exchequer Division, 36.]

Dec. 10, 1875.

[IN THE COURT OF APPEAL.]

MACKENZIE v. WHITWORTH (').

Marine Insurance—Reinsurance—Policy—Interest.

An underwriter who has subscribed an insurance "on goods" may reinsure by the same description, and the policy need not be expressed to be a reinsurance.

CASE stated on appeal, under the Common Law Procedure Act, 1854, from a decision of the Court of Exchequer (*).

The declaration was on a policy of insurance, dated the 24th of April, 1873, whereby the plaintiff through his agents as well in their own name as for and in the name and names of all and every other person to whom the same did appertain, caused himself and them "to be insured, lost or not lost, at and from New Orleans to Revel . . . upon goods . . . beginning the adventure upon the said goods from the loading thereof on board the ship Southampton at as above." The goods, for so much as concerned that agreement, were

(') Affirming 12 Eng. Rep., 582.

(*) Law Rep., 10 Ex., 142.

valued at "£5,000 on cotton." The declaration, after stating the policy, averred that the United *States [37 Lloyd's and Individual Underwriters at New York were interested in the goods, and that the insurance was made for the use and benefit and on account of the persons so interested. The defendant pleaded amongst other pleas, (4,) denial of the interest alleged; (8,) concealment of the fact that the nature of the interest of the plaintiff and the U. S. Lloyd's and Individual Underwriters of New York was that of insurers desiring reinsurance.

At the trial before Pollock, B., at the Liverpool Summer Assizes, 1874, it was proved that the plaintiff, an insurance agent, effected the insurance on behalf of the U. S. Lloyd's and Individual Underwriters of New York, who had effected an insurance on the goods, being cotton to be shipped by Tatman & Co., of New Orleans, to the amount of £80,000, and that the insurance sued on was in fact a re-insurance by the American underwriters of a portion of the risk, they retaining their full lines, £20,000. The defendant, an underwriter, subscribed the policy sued on for £200.

In the slip which was made on the 13th of January, 1873, the insurance was expressed to be "£5,000 on cotton."

The defendant gave in evidence, by the testimony of witnesses whose evidence was not contradicted, that in all cases of reinsurance policies the invariable practice has been to disclose the fact of the insurance being a reinsurance. The fact of the policy being a reinsurance was not disclosed by the plaintiff to the defendant until after he had signed the policy, though it was disclosed to other persons who had effected policies in respect of the same risk, and the plaintiff before he sent on the slip was aware that it was a reinsurance.

The plaintiff and defendant gave evidence on the issue whether the concealment alleged in the 8th plea was a concealment of a fact material to the risk or material to be communicated to the defendant (').

It was admitted at the trial that the plaintiff and the United *States Lloyd's and Individual Underwriters of [38 New York were interested in the goods, but as underwriters only.

(') In the report of the case below, many underwriters to refuse reinsurance." A paragraph to this effect was inserted originally in the case on appeal, but was struck out at chambers as immaterial to the present question.

The cotton of the value so insured by the American underwriters was shipped at New Orleans, the ship sailed on the 28th of February, 1873, and was with the cotton destroyed by fire on the 19th of March.

Pollock, B., ruled that although the plaintiff and the American underwriters were only interested as reinsurers, their interest was sufficiently described in the policy, and that the plaintiff was entitled to recover thereon unless the failure to communicate the nature of their interest was a concealment of a fact material to the risk or material to be communicated to the defendant, and he submitted to the jury the issues of fact raised by the 8th plea. The jury found for the plaintiff on all the issues, and a verdict was entered for him, leave being reserved to the defendant to move to enter the verdict for him.

A rule *nisi* having been obtained to enter the verdict for the defendant on the ground that the plaintiff being only interested as a reinsurer was not entitled to recover on the policy sued on, the Court of Exchequer (Bramwell, Pollock, and Amphlett, BB.), on the 10th of February, 1875, discharged the rule (*).

The question for the Court of Appeal is whether the interest of the plaintiff and of the United States Lloyd's and the Individual Underwriters of New York was sufficiently described in the policy sued on, the risk being a reinsurance; whether such risk was covered by the policy; and whether the decision of the Court of Exchequer on that point was wrong. If the court should be of opinion that that decision was wrong, the verdict is to be entered for the defendant: If *contra*, judgment to be signed on the verdict for the plaintiff for £206 5s.

Nov. 16. *Herschell*, Q.C., and *Baylis*, Q.C., for the defendant, appellant: The custom proved at the trial was not merely to disclose the fact of the insurance being a reinsurance, but to state it expressly in the slip and policy. This does not appear distinctly from the case, but the evidence was so treated by Pollock, B., in his summing up, and it 39] will not be disputed by the plaintiff's *counsel. This is the point intended to be raised, and if the court considers that it is not distinctly raised the defendant desires to have the case re-stated. There is a substantial reason why underwriters should decline reinsurances, because instead of having only one party to settle with as in ordinary insurances, a third party is introduced who must be consulted.

[For the rest of the arguments and the authorities cited

(*) Law Rep., 10 Ex., 142.

on both sides it is sufficient to refer to the report of the argument in the Court of Exchequer (').]

Benjamin, Q.C., and *A. T. Lawrence*, for the plaintiff.

Cur. adv. vult.

Dec. 10. The judgment of the court (Lord Cairns, L.C., Blackburn and Brett, J.J.) was read by

BLACKBURN, J.: This is an appeal against the judgment of the Court of Exchequer, discharging a rule obtained to enter a verdict for the defendant.

The action is on a policy of marine insurance, which is set out in full in the declaration. It is in the ordinary form of a Lombard Street policy, and the blank in the printed form where it is usual to insert the description of the subject-matter of the insurance is thus filled up:—"£5,000 on cotton." The plaintiff made the policy as agent for and to protect the interest of American underwriters who had insured cotton for Tatman and Co., of New Orleans, to the amount of £80,000, and it was, in fact, a reinsurance to the amount of £5,000.

At the trial a question was raised as to whether there was an undue concealment. On that issue the verdict passed for the plaintiff without any point being reserved, and consequently the Court of Appeal has nothing to do with that issue.

The only question before this court is that stated in the rule which has been discharged, viz., whether the verdict should be entered for the defendant "on the ground that the plaintiff" (or rather the parties for whom the plaintiff made the insurance, and on whose behalf he sues), "being only interested as a reinsurer, was not entitled to recover on the policy sued on."

*It is stated in the case that "the defendant gave in [40 evidence, by the testimony of witnesses whose evidence was not contradicted, that in all cases of reinsurance policies the invariable practice has been to disclose the fact of the insurance being a reinsurance." Mr. Herschell argued on this as if it was a statement that it was the usage and custom of trade always to describe the interest in the policy as being a reinsurance; but we think the statement in the case does not bear that meaning. Reinsurance was in this country prohibited by statute 19 Geo. 2, c. 37, s. 4, unless the assurer should be insolvent, become a bankrupt, or die; "in either of which cases such assurer, his executors, administrators, or assigns might make reinsurance to the amount of

(1) Law Rep., 10 Ex., 143-146.

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the sum before by him assured, provided it was expressed in the policy to be a reinsurance;" and this prohibition continued in force till as late as 1864 (''); so that there has not been sufficient time for a custom to spring up in this country, and there is no such custom in America, where reinsurance was always lawful: see Phillips on Insurance, chap. 5, s. 498, p. 270 (3d ed.) Moreover, the evidence seems to have been directed to the issue found by the jury for the plaintiff, and has reference, not to the description in the policy, but to the practice of making a disclosure to the assurer.

The question, therefore, seems to us to be confined to this, whether, applying the ordinary principles of interpretation of written documents and the established rules of insurance law to this kind of insurance, the description in this policy is sufficient to cover it. The court below decided that it was; and we are of opinion that their decision was right, and must be affirmed.

A description of the subject-matter of the insurance is required both from the nature of the contract and from the universal practice of insurers. It is generally described very concisely as being so much "on ship," "on goods," "on freight," "on profits on goods," "on advances on coolies," "on emigrant money," and many other examples might be given. And if no property which answers the description in the policy be at risk, the policy will not attach, 41] *though the assured may have other property at risk of equal or greater value. The reason being, that the assurers have not entered into a contract to indemnify the assured for any loss on that other property.

Thus, a policy on "piece goods" will not make the insurer liable for a loss on "hats": *Hunter v. Prinsep*, Marshall on Insurance, 4th ed., p. 255.

In 1 Phillips on Insurance, chap. 5, s. 415, 3d ed., p. 231, it is said: "It is necessary that the thing insured, and in some cases also the kind of interest intended to be protected, should be sufficiently set forth in the policy, or that the policy should at least prescribe the way of ascertaining to what the contract is to be applied." And this seems a fair statement of what is required, and is in strict accordance with what is said by Lord Tenterden in *Crowley v. Cohen* (''), that, "although the subject-matter of the insurance must

(1) In 1864, by 27 & 28 Vict. c. 56, and also by 30 & 31 Vict. c. 59 (the s. 1, reassurances on sea risks were made Statute Law Revision Act, 1867.)

lawful. Sect. 4 of 19 Geo. 2, c. 37, was repealed by 30 & 31 Vict. c. 23, sch. D,

(2) 3 B. & Ad. at p. 485.

be properly described, the nature of the interest may in general be left at large."

In some cases the nature of the interest in the thing insured is such as to vary the nature of the risk, and then it should be stated. In *McSwiney v. Royal Exchange Assurance* ⁽¹⁾ the policy was "on profit on rice." The Court of Queen's Bench held the plaintiff entitled to recover, but that judgment was reversed. The Court of Exchequer Chamber, in delivering judgment, say ⁽²⁾: "The first question discussed was whether the plaintiff had an insurable interest in profits on the rice. Under the circumstances stated in the special verdict, we feel no doubt that he had. He had entered into a binding contract with Drouhet & Co., by virtue of which he would have had a right to 6,000 bags of rice delivered to him in England on the safe termination of the voyage of the *Edward Bilton* to England, with the whole of that quantity of rice on board, before the end of May; and he had made another contract to sell the rice in these events, by which contract he had secured a profit of 1s. 6d. per cwt. We have no doubt that the plaintiff might have recovered, in the events which have happened, a total loss, if he had been insured by a policy properly adapted to the case, and so drawn as to cover his special interest from the time that the rice *was appropriated by the vendors and ready to [42 be shipped at Madras, and also to insure him against losses of the expected profits, not merely by the loss of all the rice by perils of the seas, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies this special interest in profits would have been entirely defeated. If such an assurance had been made on this peculiar interest against all these events, it is obvious that the underwriters would have required a much larger premium for insuring so complicated a risk than for an ordinary insurance by an owner on goods or profit on goods, which would be liable to loss only by perils of the seas or other accidents happening to the goods themselves."

In all cases where the peculiar nature of the interest alters the risk, it may be properly said that such interest is the subject-matter of the insurance; and at all events there is great force in the argument that the nature of that interest should be stated. But in the case now before us, the nature of the interest of the parties assured in the cotton does not in the slightest degree vary the nature of the risk. Had the

⁽¹⁾ 14 Q. B., 634; 19 L. J. (Q.B.), 222.

⁽²⁾ 14 Q. B., at p. 659. 19 L. J. (Q.B.), 226.

policy in this case been made by the plaintiff in the very same terms, but on behalf of and to cover the interest of Tatman & Co., the owners of the cotton, the underwriters would have had to pay to the plaintiff the sum which would indemnify Tatman & Co. for any damage to the cotton from the perils insured against, and the plaintiff would have received that sum for the benefit of Tatman & Co. As the facts are, the persons on whose behalf the insurance is made have bound themselves to pay this sum to Tatman & Co., and the defendant is required to pay the same amount, and under precisely the same circumstances, to the plaintiff, but for the benefit, not of Tatman & Co., but of the parties on behalf of whom the plaintiff made the assurance. The subject-matter of insurance, viz., the cotton, is fully described, and there is no apparent reason which would make it just to require the nature of the interest to be described. Still, if there were a series of decisions determining that in such a case, or in cases analogous to it, a description was required beyond what would seem to us reasonable, we should be unwilling to disturb the established practice. But we do not find any such decisions.

43] *In *Glover v. Black* (1) the plaintiff had lent a sum of money on a bottomry bond, which is set out in the case at p. 1395. By the condition, if the ship arrived in the Thames, he was to be paid his loan with maritime interest, or if the ship should be utterly lost on the voyage, he was to be paid a just and proportionate average on all goods belonging to the obligor shipped at any time on the vessel, and not unavoidably lost. The plaintiff meant to insure his interest in the bond, and told the underwriters so; but by a blunder drew up the policy in the ordinary form of a policy on goods and merchandise. The underwriters were unconscientious enough to contest the policy, and Lord Mansfield very reluctantly decided in their favor. But it seems enough to state the nature of the plaintiff's interest to show that the real risk intended to be, but not described, was a very different one from that on goods, which is all that that case decided.

Lucena v. Craufurd (2) has always been treated as deciding that, though profits may be insured, they must be described as such, and we took time in this case, principally with a view to see what were the reasons for this decision, and whether they were applicable to such a case as the present.

We cannot find the reasons stated in the report of *Lucena*

(1) 3 Burr., 1894.

(2) 2 B. & P. (N.R.), 269.

v. *Craufurd* ⁽¹⁾, but in the first case of *Routh v. Thompson* ⁽²⁾, in which similar points arose soon after, Lord Ellenborough states them thus, at p. 433: "Independently, however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved: and how can it be said that these captors have any interest either in this ship or freight, when the ship is altogether the King's; the freight is altogether the King's; and the captors have no interest in either, nor other concern in respect to the same, beyond a mere chance that the *King may be induced to give [44 them something out of the produce of such ship and freight?"

This reasoning, whether binding as an authority or not, is clear and intelligible; but it seems to us to have no application to such a case as the present. The assured here had a direct interest in the safe arrival of the cotton: not in any way a collateral interest in something else after the cotton arrived. It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy, it would have in no way altered the effect of the defendant's contract, which would still have remained a contract to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against. We think, therefore, that the judgment below should be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Norris, Allens & Carter, for Simpson & North, Liverpool.*

Solicitors for defendant: *Gregory & Co., for Hull, Stone & Fletcher.*

⁽¹⁾ 2 B. & P. (N.R.), 269.

⁽²⁾ 11 East, 428.

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West v. Baker.

[Law Reports, 1 Exchequer Division, 44.]

Dec. 6, 1875.

WEST V. BAKER.

Bankruptcy—Vesting Estate of Debtor in Trustee—Composition—Annuling Bankruptcy—Right to set off Unliquidated Damages—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 28, 81, 126.

A person in whom the estate of a bankrupt was, on the annulling of the bankruptcy, vested under s. 81, of the Bankruptcy Act, 1869, having sued for a debt due to the bankrupt, the defendant pleaded a set-off, by way of mutual credit at the time of the bankruptcy, between the defendant and the bankrupt, for unliquidated damages provable in bankruptcy, and which would have been provable against the bankrupt had the proceedings in bankruptcy continued against him. On demurrer:

Held, that the plea was good, as the vesting order vested the property of the bankrupt in the plaintiff, subject to the right to set off debts which would have been provable in the bankruptcy.

DECLARATION, that the plaintiff, the person duly appointed by an order of the Court of Bankruptcy, bearing 45] date the 6th of *April, 1871, by virtue of which order, and of the 81st section of the Bankruptcy Act, 1869, the property of one James West, including the causes of action hereinafter mentioned, became and was duly vested in the plaintiff (James West having been duly adjudicated a bankrupt according to the provisions of the act, and the bankruptcy having been afterwards, to wit, on the 6th of April, 1871, duly annulled by order of the Court of Bankruptcy, and in pursuance of the provisions of the act), sued the defendant for money payable by the defendant to the plaintiff, as such person duly appointed as aforesaid, for work and labor done and materials provided by James West, as a builder and otherwise, before he became bankrupt, for the defendant, at his request, and on accounts then stated between the defendant and James West, and on accounts stated between the plaintiff as such person duly appointed as aforesaid and the defendant.

Fourth plea, that before the 6th of April, 1871, and before the property of James West became and was duly vested in the plaintiff as alleged, and before James West had been duly adjudicated a bankrupt, and before and at the commencement of this suit, James West was, and still is, indebted to the defendant for debts due by him to the defendant and for damages provable in bankruptcy by the defendant against him; and that before and at the commencement of this suit, there was, and still is, a mutual debt and credit between James West and the defendant, in an amount equal to the plaintiff's claim and of the alleged

debt due and owing from the defendant to the plaintiff in respect of a debt due from James West to the defendant, and damages provable in bankruptcy by the defendant against James West, and that the debt and the damages aforesaid would be provable against the estate of James West, had he still continued to be a bankrupt, and the defendant would be entitled to set off the same against such estate had the assignee in bankruptcy of James West now sued the defendant, and the defendant is willing to set off and sets off the amount of the debt and damages to an amount equal to the plaintiff's claim in respect of the matter herein pleaded to.

Demurrer and joinder.

Malden, for the plaintiff: The plea is bad, as a set-off for *unliquidated damages can only be pleaded in bank- [46
ruptcy. The substance of the plea is, that if the bankruptcy had gone on, the defendant would have been entitled to set off this claim, but to this the fact that the bankruptcy has been annulled is a complete answer. The bankruptcy has been annulled in accordance with the terms of the composition entered into between the bankrupt and the creditors.

Boddam, for the defendant: The plaintiff's sole right to sue is founded on the order in bankruptcy, which vested the bankrupt's estate in him under the Bankruptcy Act, 1869, s. 81, and he cannot at the same time say that his rights arise from the bankruptcy, and yet are independent of it, as they must be if the contention that this set-off is not available is right. The bankruptcy, as pointed out in the note to s. 81 of the act, in *Williams's Bankruptcy*, is not so much annulled as superseded, as the proceedings remain under the control of the Court of Bankruptcy. If, however, the plaintiff claims, not under the vesting order, but under the terms of the composition, that would be a matter for reply ⁽¹⁾.

Malden, in reply: If there are any conditions in the composition deed favorable to the defendant, he should have set them out in the plea.

KELLY, C.B.: I think that the defendant is entitled to judgment. When we look to the provisions of the Bankruptcy Act we find it is defective in this respect, that it does not provide for a case like the present. In the 28th section we find the power given which has been exercised in this case, and under which the bankruptcy has been annulled. There has been a meeting of creditors, and a general scheme of settlement has been agreed on and received the approval

⁽¹⁾ The composition deed was produced in court.

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of the court, and one of the terms of the settlement is that the bankruptcy should be annulled. The whole estate of the bankrupt was undisposed of; and the court has power under the 81st section, in the case of an adjudication being annulled, to order that the property of the debtor shall vest in such person as the court may appoint, or, in default of such appointment, revert to the bankrupt. This latter has 47] not been *done; but the court has transferred the whole estate of the bankrupt to the plaintiff, no doubt in consideration of the plaintiff having guaranteed a dividend of 7s. 6d. in the pound. Does this transfer entitle the plaintiff to recover debts freed from the right of the debtor to set off such claims as the present? I think not; because in bankruptcy the debtor could have set off this very claim; and if the court has transferred to the plaintiff all the authority itself had, that was to sue the defendant subject to the right to set off not only any specific sum, but any claim to unliquidated damages provable under bankruptcy. If this were otherwise, much injustice would be done. I apprehend the substance of the clauses of the act is, that what passed to the plaintiff was a right to receive debts, but subject to the right to set off counter claims whether of specific sums or of unliquidated damages provable in bankruptcy.

CLEASBY, B.: I think, if the whole of the 28th section is considered, it is tolerably clear that the conclusion arrived at is right. The question is, whether the effect of the 28th section was to alter the status of the defendant because of the substitution of a scheme of settlement for the bankruptcy. On looking at the section the effect appears to be that, instead of the trustee dealing with the estate, the creditors shall be at liberty to accept a composition. This, though accompanied by the annulling the bankruptcy, does not take the matter out of the Bankruptcy Court, so as to prevent the general rules of bankruptcy applying, or alter the position of the parties except so far as it may be altered by the agreement they have come to to take the composition instead of the estate. By s. 28 the provisions of a composition or general scheme made in pursuance of the act may be enforced by the court in a summary manner, and are to be binding on all the creditors so far as relates to any debts due to them and provable under the Bankruptcy Act. That clearly shows that the Bankruptcy Court still retains the scheme under its control, and therefore it is subject to the ordinary rules of that court as to set-off.

POLLOCK, B.: The only question is the sense in which the word "annulled" is used. Before this act there were two

modes *of proceeding open, either to go on under the [48 bankruptcy, or to annul the proceedings altogether. Now, however, there is an intermediate course by which the control of the court is retained, and the annulling of the bankruptcy only means that there shall be no adjudication of bankruptcy in the ordinary way, but the proceedings shall be moulded on the terms of the composition, under the direction of the court.

I think, therefore, with my Lord and my Brother Cleasby that the defendant is entitled to judgment.

Judgment for the defendant.

Solicitors for plaintiff: *Risley & Stoker.*

Solicitors for defendant: *Robinson & Preston.*

[Law Reports, 1 Exchequer Division, 48.]

Nov. 20, 1875.

OSBORNE V. HOMBURG.

Action in Superior Court—Claim reduced by Payment below £50—Payment after Action brought—County Court Act, 1867 (30 & 31 Vict. c. 142), s. 7.

The power given to a defendant under the County Court Act, 1867, to apply to have a case tried in a county court where the claim indorsed on the writ exceeds £50, but such claim has been reduced by payment to a sum not exceeding £50, does not apply where the payment is made after action.

THE plaintiff issued a writ in this court against the defendant for £66 18s. The defendant, admitting that he was indebted to the plaintiff to the amount of £43, applied first of all at Chambers to have the action stayed on payment of that sum, but as the sufficiency of the amount was disputed, no order was made. The defendant then applied for and obtained an order that on payment of £43 at once to the plaintiff the action should be remitted to a county court, under s. 7 of the County Court Act, 1867 (30 & 31 Vict. c. 142), which enacts that, "Where in any action of contract brought or commenced in any of Her Majesty's Superior Courts of Common Law the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment, admitted set-off, or otherwise, to a sum not exceeding fifty pounds, it shall be lawful for the defendant in the action within eight days from the day upon which the *writ [49 shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at Chambers for a summons to the plaintiff to show

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cause why such action should not be tried in the County Court, or one of the County Courts, in which the action might have been commenced; and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly."

A rule having been obtained to rescind this order,

Murphy, Q.C., showed cause: The order was right. The statute was meant to enlarge the power given by 19 & 20 Vict. c. 108, s. 24, so that where the sum really in dispute is less than £50 the matter may be taken to a county court. The words of the former statute were, "Where in any action the debt or demand claimed consists of a balance not exceeding £50, after an admitted set-off of any debt or demand claimed by the defendant from the plaintiff." The present statute goes further and gives the defendant an opportunity of acknowledging part of plaintiff's claim, provided he does so promptly and before any expense is incurred about the pleadings.

Kingsford, in support of the rule: *Walesby v. Goulston* (1) shows that under 19 & 20 Vict. c. 108, s. 24, "admitted set-off" must mean admitted before action, so here the claim indorsed on the writ is the claim at the time of action, and since that is over £50 the plaintiff is entitled to sue in the Superior Court. [He referred also to *Awards v. Rhodes* (2).]

PER CURIAM (Cleasby, Pollock and Amphlett, BB.). The payment, which is to have the effect of reducing the original claim below £50, must have been made before action. The order is therefore wrong, and must be rescinded.

Rule absolute.

Solicitor for plaintiff: *W. Eley*.

Solicitor for defendant: *E. D. Lewis*.

(1) Law Rep., 1 C. P., 567.

(2) 8 Ex., 812; 22 L. J. (Ex.), 106.

C A S E S
DETERMINED BY THE
PROBATE DIVORCE AND ADMIRALTY DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THAT DIVISION
AND BY THE
ECCLESIASTICAL COURTS,
XXXIX VICTORIA.

[Law Reports, 1 Probate Division, 43.]

Nov. 2, 1875.

*THE M. MOXHAM. (7151.)

[43]

Damage—Damage done to Pier situate in Country of a foreign State—Law of the Flag.

An English joint stock company, possessed of a pier at M., in Spain, instituted a cause of damage against an English steamship, which, it was alleged, had, by reason of the negligence of those in charge of her, come into collision with and damaged the pier. The owners of the steamship filed an answer, and therein alleged *inter alia* that the pier formed part of the land of Spain, and that by the law of Spain the master and mariners were alone answerable for the damage caused by the negligent navigation of the ship.

On motion to reject this portion of the answer :

Held, that the law of Spain was not applicable to the circumstances of the case, and that so much of the answer as pleaded that law must be struck out.

THIS was a cause of damage instituted on behalf of the Marbella Iron Ore Co., Limited, against the English steamship M. Moxham and her freight in the sum of £2,500. The suit was *brought for the recovery of damage sustained in consequence of the M. Moxham having come into collision with a pier possessed by the plaintiffs at Marbella, in Spain. An appearance was entered on behalf of the owners of the M. Moxham on the 21st of January, 1875, and the

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M. Moxham having been arrested in the suit, bail to answer judgment was put in in the sum of £1,800.

The petition, as amended, alleged in substance as follows :

"1. The plaintiffs are the Marbella Iron Ore Company, Limited, an English joint stock company established under the Companies Act, 1862, and the acts incorporated therewith, for the purpose, among other things, of exporting ore from Marbella, in the country of Spain, to England and other places. The offices of the company are at No. 1 Crown Buildings, Queen Victoria Street, in the city of London. The plaintiffs were, at the time of the grievances hereinafter mentioned, possessed of a pier situate at Marbella aforesaid, for the purpose of shipping iron ore on board ships.

"2. About 8.30 a.m. on the 5th day of October, 1874, the steamship M. Moxham came to Marbella for the purpose of loading iron ore from the said pier of the plaintiffs. There was scarcely any wind at the time, and the sea was perfectly smooth, and there was no current.

"3. Those on board the M. Moxham, instead of keeping clear of the pier, as they could and might easily have done, so negligently navigated the said steamship that she approached and came into violent collision with the said pier and carried away the whole of the head of the said pier, causing enormous damage to it, and throwing several trucks laden with iron ore into the sea.

"4. The aforesaid collision and the damages consequent thereon were occasioned by the negligence and improper navigation of those on board the M. Moxham."

On behalf of the defendants an answer was filed, which, as subsequently amended, after denying that the plaintiffs were possessed of the pier, and alleging in substance that the court had no jurisdiction to entertain the suit, that the collision was not caused by the negligence of the M. Moxham, but was an inevitable accident, and that no injury would have happened to the pier if it had been in a sufficient state of repair, proceeded, in the 4th paragraph, substantially as follows :

"4. The defendants further say that the said alleged collision happened within the territory and jurisdiction of Spain, and that the said pier, at the time of the said collision, was annexed to and formed part of the land of Spain ; and that if the said collision was occasioned by any negligence or improper navigation of those on board the M. Moxham, it was solely occasioned by the negligence of the master or mariners of the M. Moxham, and not by the defendants or any of

them; and that by the law of Spain in force at the time and place of the said collision, the master and mariners of the ship, and not the ship or her owners, are liable in damages in respect of a collision occasioned as in the petition alleged; *and by such law neither the M. Moxham, nor [45 the defendants, nor any of them, are or is liable in respect of the damages proceeded for in this cause.”

On the 8th of July the solicitors for the plaintiffs gave notice that they should by counsel move the judge in court for leave to strike out so much of the answer as alleged that the court had no jurisdiction to entertain the suit, and also art. 4 of the said answer. An affidavit was brought in support of the motion in which one of the firm of solicitors retained for the plaintiffs alleged *inter alia* as follows:

“A few days after the collision the M. Moxham was arrested by process issuing out of the proper tribunal in Spain. At the time of the collision the M. Moxham was under charter, and upon the vessel being arrested, the defendants communicated with the plaintiffs with a view to procure the release of the ship, and thereupon, in order to obtain the said release, an agreement was made between the plaintiffs and defendants, and also between the plaintiffs and the captain of the M. Moxham, at his request and with the authority of the defendants, that the said vessel should be released and that the liability of the defendants for the alleged negligence of the ship should be determined by proceedings in the English courts. Upon the faith of these agreements the M. Moxham was released and was allowed to be loaded, and sailed for England for the benefit of the owners and charterers.”

July 27. *Butt*, Q.C., and *Benjamin*, Q.C. (*Johnstone* with them), on behalf of the plaintiffs, moved in the terms of the notice of motion. They argued in support of the jurisdiction of the court, and referred to the following authorities: *Mostyn v. Fabrigas* ⁽¹⁾; *Doulson v. Matthews* ⁽²⁾; 24 Vict. c. 10, s. 2; *The Uhla* ⁽³⁾ ⁽⁴⁾.

Watkin Williams, Q.C., *J. C. Mathew*, and *E. C. Clarkson* appeared for the defendants, and on the counsel for the plaintiffs concluding their argument on the question of jurisdiction, stated to the court that they were not prepared, in view of the agreement entered into at Marbella with respect to the release of the M. Moxham, to support the objection they had taken to the jurisdiction of the court.

⁽¹⁾ 1 Cowp., 161; 1 Sm. L. C. 658, 7th ed.

⁽²⁾ 4 T. R., 503.

⁽³⁾ Law Rep., 2 A. & E., 29, n.

⁽⁴⁾ See also *The Merle*, 2 Asp. Mar. Law Cas., 402.

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SIR ROBERT PHILLIMORE: The inclination of my mind, subject to any argument on the point I might have heard from the counsel of the defendants is, that the court has 46] jurisdiction over *the case. In these circumstances I shall treat the case not as coming before me by consent, but as one within the ordinary jurisdiction I possess to entertain suits arising out of collisions in foreign waters where no circumstance by which such jurisdiction might be ousted has been brought to my notice.

Butt, Q.C., and *Benjamin*, Q.C.: The question of jurisdiction having been settled, the only point remaining to be argued is as to the admissibility of the 4th paragraph of the answer. Now the 4th paragraph sets up the law of Spain as the law by which the case is triable and in effect alleges that not the defendants—the owners of the ship doing damage—but other persons, are liable for the maritime tort in respect of which the suit is brought. It is submitted on the part of the plaintiffs that the *lex fori*, which is also the law of the flag, must govern the case, and that therefore all reference to the law of Spain, or any law other than English law, is clearly irrelevant. On this the case of *The Halley* (*) is the ruling authority, and is strictly in point with the present case. The plaintiffs also rely on the case of *Scott v. Seymour* (*), for although it may be said that the majority of the court there only decided that in matters of procedure the *lex fori* was the law to be applied, yet the judgment of Wightman, J., certainly puts the question on higher grounds, holding that it would be wrong to apply the foreign law in a case between two British subjects where, if the *lex fori* were not to supply the governing rule, the plaintiff would be defrauded of a right recognized by the laws of England.

[SIR ROBERT PHILLIMORE referred to *Messina v. Petrocchino* (*).]

The Central Criminal Court has within the last forty years taken cognizance of a charge of murder arising out of a duel fought at Bologne, in France, and quite recently in *Reg. v. Anderson* (*), it has been distinctly laid down that crimes committed on board a British ship in a foreign navigable river are within the admiralty criminal jurisdiction. The 47] case of *The *Halley* (*) may really be taken to be an authority that where a maritime tort has been committed a ship-owner is to be held in relation to the acts of the master, his servant, to be bound by the law of the flag. If, however, it be said that there is no actual decision that in cases

(*) Law Rep., 2 A. & E., 3; Law Rep., 2 P. C., 193.

(*) 1 H. & C., 219; 32 L. J. (Ex.), 61.

(*) Law Rep., 4 P. C., 144.

(*) Law Rep., 1 C. C., 161.

of tort the law of the flag must govern, yet it cannot be denied, since the decision in *Lloyd v. Guibert* ⁽¹⁾, that in cases of contract the rights conferred on the ship-owner by the law of the flag are the only rights which can be recognized in the absence of any express stipulation to the contrary. If, then, we find that in criminal cases it has also been decided that the responsibilities of the master and crew of an English ship, even when within a foreign navigable river, are those imposed on them by the law of England, *Reg. v. Anderson* ⁽²⁾, surely the same considerations must apply in cases where a tort has been committed, and it must follow that the law of England, as the law of the flag, governs the rights and liabilities of the ship-owner, whenever reparation at the suit of an English company is sought for damage committed by the master of an English ship within the jurisdiction of the Court of Admiralty.

Watkin Williams, Q.C., and J. C. Mathew: The defendants can only be held liable for an act which would be held wrongful by the law of the country in which it was committed. The case of *The Halley* ⁽³⁾ is the converse of the present case, and the decision there only lays down this proposition, that if a defendant is sued here for a tort committed abroad it is not enough to entitle the plaintiff to succeed that a liability according to foreign law should be proved, but that it is also necessary to show that a liability recognized by English law was created by the commission of the act in question. Here the English law if applied, would not lessen the liabilities of the ship-owner, but would create a new obligation unknown to the law of the place where the tort was committed. Indeed it is a mistake to suppose that the case of *The Halley* ⁽⁴⁾ affords any support to the contention that a defendant accused of a wrongful act before the courts here is to be deprived of any benefit he might have gained by having his rights tried by the law of the country in which the act was done. In fact, the case *if rightly examined is merely an illustration of the [48 principle laid down in *Leroux v. Brown* ⁽⁵⁾ that the English law of procedure will restrict the rights of the party suing to those recognized by English law.

[SIR ROBERT PHILLIMORE referred to *Don v. Lippman* ⁽⁶⁾.]

The defendants admit that in the present case the *lex*

⁽¹⁾ 6 B. & S., 60; 33 L. J. (Q.B.), 241; ⁽²⁾ Law Rep., 2 A. & E., 8; Law Rep., Law Rep., 1 Q. B., 115. 2 P. C., 193.

⁽³⁾ Law Rep., 1 C. C., 161.

⁽⁴⁾ 12 C. B., 801; 22 L. J. (C.P.), 1.

⁽⁵⁾ 5 Cl. & F., 1.

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fori must be applied, but the *lex fori* in its turn adopts the law of the locality of the act, that is, Spanish law, as the law governing the substantial rights of the parties to the suit. This principle has been acted upon in cases where questions of the validity of Scotch or foreign marriages have come before the courts.

[SIR ROBERT PHILLIMORE: In *Dalrymple v. Dalrymple* (1) Lord Stowell said, "Here the law of England withdraws altogether and leaves the legal question to the exclusive judgment of the law of Scotland." In cases, however, of incestuous marriages and others where an attempt has been made to rely on principles which are contrary to natural justice, it has been held that the foreign law ought not to be adopted in our courts (2).]

It cannot be that the plaintiffs by choosing to proceed in this country can convert into an actionable wrong an act for the consequences of which the defendants would not be liable by the law of Spain. The true principle is laid down in *Phillips v. Eyre* (3). "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England. . . Secondly, the act must not have been justifiable by the law of the place where it was done:" *Phillips v. Eyre* (4). The case of *Dobree v. Napier* (5), is also an authority that the defendants, not being liable by the Spanish law, cannot be held liable here. The defendants have relied on *Lloyd v. Guibert* (6) and *Reg. v. Anderson* (7), but the Court of Exchequer 49] Chamber in deciding that in **Lloyd v. Guibert* (8) the governing law was the law of the flag, only found that it was the intention of the parties to be bound by that law, whilst in *Reg. v. Anderson* (9) the act done was unlawful by that law by which, in other respects, the crew of the ship had agreed to be bound. Moreover, *Reg. v. Anderson* (10) is not so analogous to the present case as *Reg. v. Lesly* (11), where an impressment in Chili on board a British ship, lawful there, was held by Erle, C.J., and the Court for Crown Cases Reserved, to be no ground for an indictment here: *Phillips v. Eyre* (12).

(1) 2 Hag. Cons., at p. 59.

(2) See *Hyde v. Hyde*, Law Rep., 1 P. & M., 130.

(3) Law Rep., 6 Q. B., 1.

(4) Law Rep., 6 Q. B., at p. 28; see also notes to *Mostyn v. Fabrigas*, 1 Sm. L. C., 658, 7th ed.

(5) 2 Bing. N. C., 781.

(6) 6 B. & S., 60; 33 L. J. (Q.B.), 241; Law Rep., 1 Q. B., 115.

(7) Law Rep., 1 C. C., 161.

(8) Bell's Cr. C., 220; 29 L.J. (M.C.), 97.

(9) Law Rep., 6 Q. B., at p. 29.

[SIR ROBERT PHILLIMORE: Have you considered what would be involved in the proposition that the ship proceeded against in this case was part of the territory of England?]

If it was held as a consequence that the law of the flag must govern, the liability in each case would inconveniently vary according to the nationality of the ship doing damage. It is true the parties here are British subjects, but the plaintiffs owe temporary allegiance to Spain, and with respect to the wrong they have committed are amenable to Spanish law. [They referred to *General Steam Co. v. Guillou* (*).]

Benjamin, Q.C., in reply: The cause of action, in respect of which the plaintiffs are proceeding, is the negligent navigation of an English ship, *The Industrie* (*), whilst the injury done to the pier is merely a consequence of such negligent navigation. This being so, it must be admitted, as the wrongful act was done upon the water within the jurisdiction of this court and in an English ship, that the liabilities arising from the commission of the act must be those imposed by English law.

July 29. THE COURT directed that the fourth article should be reformed, and announced that it would deliver a reasoned judgment after the vacation.

Cur. adv. vult.

Nov. 2. SIR ROBERT PHILLIMORE: In this case a suit has been instituted on behalf of an English joint stock company who are possessed of a pier at Marbella, in Spain, [50 against the steamship M. Moxham. The petition alleges that the negligent navigation of the steamship brought her into collision with the pier and caused great damage to it. The answer denies the negligent navigation, and says that the damage was the result of inevitable accident or of the insufficient state of the pier, and further pleads in the 4th article, according to the amendment proposed and accepted at the hearing, as follows: [His Lordship here read the 4th article as above set out.]

The article has been objected to on the ground that the law of Spain does not govern the question which is to be decided according to the law of England; and the objection to the jurisdiction pleaded in the former article of the answer having been withdrawn, the only question I have now to determine is, whether the law of Spain or the law of England is to be applied to the circumstances of the case. The damage of which complaint is made must be taken to have been inflicted by a British merchant vessel while in

(*) 11 M. & W., 877.

(*) Law Rep., 3 A. & E., 303.

The M. Moxham.

subject to the admiralty jurisdiction within the ebb
of the tide upon a pier in the territory of Spain.
The injury, therefore, was done from the merchant
ship, though the object injured was situate on the
The defendants contend that in the circumstances
the law must apply the local law which, as they allege,
exonerates the ship from liability, and neither the *lex fori* nor
the law of the flag under which the ship, if improperly navi-
gated, would be liable for the damage. Various cases were
cited in support of this proposition. Among them *Dobree*
and *Phillips v. Eyre* (*), as decided in the
Court of Bench and in the Exchequer Chamber; but the
ground of these cases was in great measure dependent upon
the circumstances and upon the powers of a colonial
jurisdiction as recognized by the law of the empire; and in
the present case the alleged tort arose out of an act of an
officer of a foreign state acting, as the court held, lawfully in
the exercise on the high seas of a vessel breaking the blockade,
and therefore, committing no trespass. Both cases more-
over turning upon acts of state, afford no safe analogy upon
which the court could rely. Upon behalf of the plain-
tiffs three cases were especially relied upon: *Reg. v. Ander-*
Lloyd v. Guibert (*); and *The Halley* (*). In the
last case, which related to a charge of manslaughter com-
mitted on board an English vessel within a French river
where the tide ebbed and flowed, Bovill, C.J., said, "There
is no doubt that the place where the offence was committed
was within the territory of France, and that the prisoner
was therefore subject to the laws of France, which that
court might enforce if they thought fit; but at the same
time he was also within a British merchant vessel, on board
that vessel as a part of the crew, and, as such, he must be
taken to have been under the protection of the British law
and also amenable to its provisions." And in this view
the other judges seem to have concurred. It seems hardly
necessary to refer to other cases, but I would observe that
the case of *Lloyd v. Guibert* (*) establishes that, in a case
of contract, the responsibility of the owner of a vessel for
the acts of his servants is governed by the law of the flag.
With regard to *The Halley* (*), I think it unnecessary to
enter into an examination of that case, the decision in which
is of more indirect application; but I agree with the counsel
for the plaintiffs that it points in the same direction. Upon

N. C., 781.

(*) Law Rep., 1 Q. B., 115.

(1) 2 Bing. Rep., 4 Q. B., 225; 6 Q. B., 1.

(*) Law Rep., 2 P. C., 193.

(2) Law Rep., 1 C. C., 161.

(3) Law Rep., 1 C. C., 161.

the whole, I am satisfied, both upon principle and upon the authority of precedents, that the Spanish law is not applicable to the present case, and that the 4th article must be reformed by striking out all that portion which pleads the Spanish law, that is, all the words after the words "the land of Spain."

Solicitors for plaintiffs: *C. C. Ellis & Co.*

Solicitors for defendants: *Parker & Clarke.*

See 14 Eng. Rep., 440 note; *Id.*, 640 note.

The laws of a foreign state operate beyond its territorial limits only *ex comitate*. The courts of a state where the laws of such foreign state are sought to be enforced, will use a sound discretion as to the extent and mode of that comity. They will not permit their tribunals to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the state that enacted the law, and which tend to operate with hardship on their own citizens and subjects.

A creditor of a corporation, created under the laws of Ohio, filed a bill to enforce the individual liability of the stockholders of the corporation. The corporation had no assets in this state, and none of its stockholders resided here. The bill contained no recital by what remedial process the individual liability of stockholders is enforced in that state. Held, that comity does not require the courts of this state, in the exercise of a judicial discretion, to give

effect here to the statutes of that state: *Rice v. Hosiery Co.*, 56 N. H., 114, 127-130; *Erichsen v. Nesmith*, 15 Gray, 221; *Erichsen v. Nesmith*, 4 Allen, 233; *Erichsen v. Nesmith*, 46 N. H., 371.

A non-resident of Canada may have an order of arrest or an attachment against another non-resident or his property on the ground that he is about to quit Canada with an intent to defraud: *Rogers v. Cutting*, Upper Can. Q. B., 9 Chic. Leg. News, 256, citing *Blumenthal v. Solomon*, 2 U. C. Pr. Rep., 51; *Romberg v. Steenbock*, 1 *id.*, 200; *Brett v. Smith*, 1 *id.*, 315; *Palmer v. Rogers*, 6 Local Courts Gaz., 188; *Ferry v. Comstock*, 6 Canada Law Jour., O.S., 235; *Jones v. Engo*, 25 Upper Can. Q. B., 594.

Though such an order would be discharged if the defendant show he was merely in Canada on some temporary business, intending clearly to return to his own country, for a debt contracted there: *Brett v. Smith*, 1 Upper Can. Pr. Rep., 315; *Frear v. Ferguson*, 2 Chambers Rep., 144.

CRIMINAL LAW CASES

IRELAND.

[18 Cox's Criminal Cases, 275.]

COURT FOR CROWN CASES RESERVED.

Nov. 22 and 23, 1875.

(Before Whiteside, C.J., Palles, C.B., Keogh, J., Fitzgerald, B., Deasy, B. Morris, J., Lawson, J., Barry, J., and Dowse, B.)

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*REG. v. McMAHON⁽¹⁾.

Receiving stolen goods—Evidence—Count for larceny—Jury finding against the direction of the judge—Withdrawal of direction.

Where a prisoner was indicted for larceny of certain goods and also for receiving, and the evidence against her consisted of the fact of the stolen property having been found concealed on her person, at about ten o'clock on the morning after the night on which the goods were stolen, and the prisoner made a voluntary statement asserting she had found the goods, the judge directed the jury to acquit the prisoner on the count for receiving, but the jury, notwithstanding, acquitted the prisoner on the count for larceny, but convicted her of receiving, and the judge did not insist on the direction he had previously given, but reserved for the Court for Crown Cases Reserved the question as to whether the evidence was sufficient in law to sustain the conviction on the count for receiving, it was held *per curiam* (Whiteside, C.J., *dubitante*) that the evidence was sufficient to sustain the conviction.

Held also, per Dowse, B., Lawson, J., Morris, J., Deasy, B., Fitzgerald, B., Keogh, J., that whether the judge withdrew his direction as to the count for receiving or not, the evidence being sufficient in law to sustain the conviction, the conviction must stand.

CASE reserved by O'Brien, J. The prisoner was tried at the Summer Assizes, 1875, for the County Limerick. The first count of the indictment charged her with having feloniously stolen a gold chain, a bank note, and certain moneys, the property of Patrick Corbett; the second count charged her with having feloniously received the said property, 276] knowing the same *to have been stolen. The evidence of Patrick Corbett was that the prisoner had been in his employment before November, 1873, but had left before that date. On the 9th of November he left his house at half-past six. There was a door from his hall into his shop, in the shop was a standing desk, and in it some money, a one pound note of the National Bank, half a sovereign, and £3 10s. in silver, and six or seven shillings-worth of postage stamps, the money was loose in the drawer of the desk, and the desk was not locked. In another drawer of the

⁽¹⁾ Reported by CECIL R. ROCHE, Esq., Barrister-at-Law.

desk he had a gold chain. On his return to the house he found his desk open, and all the money in it taken away and also the gold chain, the only servant in the house, Ellen Sexton, was found murdered. About ten o'clock on the following morning the prisoner was arrested, and on being searched, a pound note, a half sovereign, a quantity of silver, some postage stamps, and a gold chain, were found concealed on her person and in a bundle she had with her. Mr. Corbett recognized these article as his. To one of the constables who arrested her, she made the following voluntary statement after being cautioned: "The money in my bundle was sent to me by my friends to buy clothes." Subsequently she made another statement to the following effect: "Surely to God and the Blessed Virgin nothing could be done to me, as I found the money in the bundle on the road, when I was going to the chapel, and although I told you that my friends sent the money to release my clothes it was not true, as I did not know what to say, I was so much frightened and puzzled." At the close of the prisoner's defence, the learned judge charged the jury, and explained to them the difference between the two counts in the indictment, and told them that in his opinion the evidence in the case was not sufficient to sustain the second count (that for receiving), or to convict the prisoner on that count, and that the case of the Crown against the prisoner should rest upon the ground, that she stole the articles in question as charged in the first count; he accordingly told the jury to acquit the prisoner on the second count, and to consider the case as to the first count. The jury found the prisoner "guilty" on the second count, and "not guilty" on the first count. The report of the learned judge on this matter was as follows: "Although the finding of the jury upon that second count was in opposition to the direction I had given them in my charge, it appeared to me, upon further consideration of the matter, that it would be advisable to receive and enter the verdict as given by the jury, and not to insist upon the direction I had given to the jury as to the second count, but to reserve for the consideration of the Court for Crown Cases Reserved, any question as to the validity of that verdict. The jury having been then called out, came into court, and I received from them the verdict they gave, finding the prisoner guilty on the second count and not guilty on the first. I received that verdict without expressly telling the jury that I withdrew the former direction I had given them, but I submit that my *reception [277 of the verdict was substantially a withdrawal of the pre-

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vious direction, even though my opinion as to the sufficiency of the evidence may have remained the same. That verdict was thereupon entered." The prisoner was sentenced to five years penal servitude. The following questions were put to this court by the learned judge: "First, whether the evidence in the case was sufficient in law to sustain the second count and the finding of the jury thereon? If the court should be of opinion that the evidence was not sufficient in law for that purpose then the verdict and conviction should be reversed. Secondly, supposing the evidence in the case was sufficient in law for that purpose, then whether under the circumstances I have stated, the verdict and conviction should be annulled or reversed upon the ground that the finding of the jury on that second count was in opposition to the direction I had previously given them in my charge, from which direction the Crown counsel did not express any dissent until after it was stated that the jury had agreed to find the prisoner guilty on that count, or whether the verdict and conviction should be affirmed?"

Michael O'Loughlen (with him *Atkinson*), for the prisoner, having commented on the evidence, contended that on the first question there was no evidence to sustain a conviction. Applying the maxim *De minimis non curat lex*, when we say there is no evidence to go to the jury, we do not mean that there is literally none, but that there is none which ought reasonably to satisfy a jury that the fact sought to be proved is established (*Jewell v. Parr*, 113 C. B., O.S., 916). The Crown consented to the course taken by the judge. It was his duty to determine whether there was evidence to go to the jury, and the jury were bound to follow his direction. Hale (2 Pl. Cr. 309) thus lays it down: "But what if a jury give a verdict against all reason, convicting or acquitting a person indicted against evidence, what shall be done? I say if a jury will convict a man against or without evidence, and against the direction or opinion of the court, the court hath this salve to relieve the person convicted before judgment and to acquit the King and certify for his pardon. And as to an acquittal of a person against full evidence, it is likewise certain the court may send them back again, and so in the former case to consider better of it before they record their verdict; but if they are peremptory in it, and stand to their verdict, the court must take their verdict and record it, but may respite judgment upon the acquittal." The mere possession of stolen property is evidence *prima facie* not of receiving but of stealing (*Reg. v. Oddy*, 2 Den. C. C., 273; per Alderson,

B., *Reg. v. Densley*, 6 Car. & P., 399; *Reg. v. Smith*, 1 Dears. C. C., 494; *Reg. v. Langmead*, Leigh & Cave C. C., 427; *Reg. v. Byrne*, 1 Rep., 4 C. L., 68; *Reg. v. Perkins*, 1 Den. & P., 459, 5 Cox C. C., 554; *Reg. v. Coogins*, 12 Cox C. C., 517). As to the amount of evidence necessary to submit to the jury: "Formerly it used to be held that if there was what was called a scintilla of evidence in support of a case, the judge was bound to *leave it to the jury. [278 But a course of recent decisions (most of which are referred to in the case of *Ryder v. Wombwell*, L. Rep., 4 Ex., 32) has established a more reasonable rule, viz., that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed" (*Gibbin v. McMullen*, L. Rep., 3 P. C., 335).

Sir Coleman O'Loughlen, Sergt. (with him *De Moleyns*, Q.C., and *Peter O'Brien*), for the Crown, relied on 2 Hale P. C., 313, where, after alluding to *Tomson's Case*, he remarks: "It was agreed by all the judges of England (one only dissenting) that this fine was not legally set upon the jury, for they are the judges of matters of fact, and although it was inserted in the fine that it was *contra directionem curiæ in materiâ legis*, this mended not the matter, for it was impossible any matter of law could come in question till the matter of fact were stated and settled and agreed by the jury, and of such matter of fact they were the only competent judges" (4 Blacks. St., 6th ed., p. 524).

DOWSE, B.: I am of opinion that the conviction should stand, as there was abundant evidence to go to the jury on the count for receiving. There were two counts, one for larceny, and the other for receiving. Evidence was given on behalf of both the Crown and the prisoner in reference to both charges. It was not till the end of the case that the judge withdrew (if he did withdraw) the evidence on the second count. I am not inclined to quarrel with any of the cases cited by Mr. Atkinson; they establish that if there was nothing more than the possession of stolen property, that would only sustain the charge of larceny, and not that of receiving; the possession, however, of the stolen property is a step in the case for receiving. There are circumstances in this case which carry it further; we have the woman's own statements as to where she got the goods. There was abundant evidence to sustain the conviction at law. As to the second question, it seems to me that prac-

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tically the judge withdrew the direction he had originally given to the jury. There is, I confess, some difficulty in deciding whether the judge did withdraw the direction from the jury, but I think it better to answer the question on the assumption that he did. If the evidence was sufficient in law to warrant a conviction, that conviction should not be reversed, because the judge was wrong and the jury right. I can conceive a case in which the court would reverse the conviction if they thought the party was prejudiced; but I cannot consider what we should have done under other circumstances which might have given a wholly different complexion to the case. The prisoner here has given all the evidence she could; she is as well off in this view of the case as she would have been in the other; she has got no longer sentence. I do not wish to be taken as saying that I would put jurymen in the place of judges, but being satisfied that the conviction is right in *point of law, I do not see why I should quash it on a point of form.

BARRY, J.: I am of opinion that the conviction should be affirmed. I base my decision in the case upon the peculiar circumstances and wish to lay down no abstract proposition. I am of opinion that the recent possession of the stolen goods was evidence of stealing them or of receiving them knowing them to be stolen, and the jury had a right to arrive at one conclusion or the other. As regards the second question, it places us in rather a perplexing position. It does not appear clearly what was in the judge's mind as to what passed between him and jury. I feel some difficulty in getting rid of the passage which has been cited to us from Hale (2 Hale P.C., 309). But I think we have upon this record matters which enable us to arrive at a conclusion which will sustain this verdict. I think there are passages in the judge's report which show that he had withdrawn his direction. He says: "It appears to me it would not be advisable to insist upon the direction I had given them on the second count." He here says he does not deem it advisable to insist upon the direction, but that he did not expressly withdraw the former direction. Under these circumstances, I do not think we ought to indulge in too great subtlety. Upon the whole I think there was clear evidence on the second count.

LAWSON, J.: I think there was ample evidence to support the conviction on the second count. Here, considering the length of time which elapsed, and the possibility of other persons having had access to the premises, I think the possession of the goods was evidence in support of the

second count. As to the second question I am at a loss to arrive at a conclusion as to what the learned judge means. If he withdrew his direction, he need not have reserved the question for us. It is enough for me to say that whether he withdrew it or not the legal result is the same. I should be sorry to throw any doubt on the law as to this point. If the evidence was sufficient to support the conviction, that conviction was right whether the direction was or was not withdrawn.

MORRIS, J.: In this case the first question we are asked is intelligible enough, namely, as to whether there was evidence to support this conviction. I am of opinion that there was. It has been held that the recent possession of stolen property is evidence of simple larceny. Recent is a complex term; what in some cases would be recent possession would not be recent in others; in each case it must depend upon the special circumstances. In this case the property was stolen the night before, and the woman was found next day with the property hidden upon her. I do not think this falls within the rule as to recent possession. There are many circumstances which might enable the jury to say that although she did not steal the property herself, she did receive it knowing it to be stolen. On this count I am of opinion there was ample evidence. We now come to the second question, *which is truly a perplexing one. I [280 am of opinion that the learned judge never withdrew his direction. He first says he told the jury to acquit the prisoner on the second count; he then says he came to the conclusion it would be advisable to receive and enter the verdict. I think that means he decided to receive the verdict and abide by the direction. He did not withdraw his direction by word; how else could he withdraw his direction? We ought to face the fact which in my opinion clearly arises, suppose a judge tells a jury there is no evidence, and the jury still convict, is that conviction to be set aside when there is ample evidence to sustain it? Such a proposition is revolting to common sense and to common law. If the jury, in defiance of the judge, find a prisoner guilty, this conviction will be quashed if it be wrong in point of law, but not because it is contrary to the judge's direction. Here there was ample evidence to sustain the conviction.

DEASY, B., concurred with Morris, J., as to the first question. As to the second it seems that the direction was not withdrawn. In my opinion the direction of the learned judge was wrong and the conviction right. The conviction was upon evidence which was received and acted on by the

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learned judge, and should not be set aside; he acted upon it by receiving the verdict. The prisoner was in no way prejudiced by anything which took place during the course of the trial, as this discussion did not take place till the trial was over.

FITZGERALD, B., concurred that conviction on the second count was sustained by the evidence. This is a case of circumstantial evidence; there was no direct evidence. In order to sustain a count for receiving, there ought to be evidence that the goods were stolen, that they were in the possession of the party charged, and there ought also to be evidence that the prisoner was with the party who took them and carried them away. It is true that the two first of these matters, viz., that the goods were stolen, and in the possession of the party charged, with a guilty knowledge on his part that they were stolen, would sustain a conviction for stealing. They are, however, essential elements to sustain a charge of receiving the goods knowing them to be stolen. All the judge has to do is to say whether there is or is not evidence consistent with the goods having been taken by another than the prisoner. If there is a rational hypothesis that this was so, all the judge has to do is to leave it to the jury. Here there was clear evidence of circumstances not inconsistent with the fact of the goods having been taken by another than the prisoner. As to the second question—if I am obliged to determine the question—I must decide that the direction of the learned judge was wrong.

KEOGH, J.: There was abundant evidence to sustain the verdict, and nothing said by the learned judge previous or subsequent to the verdict should induce us to annul it.

PALLES, C.B.: To make a complete case of receiving as 281] *distinguished from larceny one matter is material and one alone, that is, evidence that some person different from the prisoner was the thief. There is a strong case on the evidence that the prisoner was the thief: was there evidence to go to the jury that the thief was some other person? There was a possibility that it was committed by some other person. She has confessed she found the property; the jury may adopt a part of her statement, and may disbelieve the other part. In dealing with this very technical question, merely being obliged to ask was there evidence that a crime was committed by some other person, I think that there was. As to the other point, I think it would be hard to come to any other conclusion than that the learned judge withdrew his direction, but I desire not to express any opinion on this part of the case. Assuming that he did

withdraw it, I think the verdict was rightly received, and that we should not annul it. See *Bushell's Case* (Vaugh., 135).

WHITESIDE, C.J.: In this case, although I have my own opinion, I do not dissent from many of the observations of my brethren. As regards the prisoner it seems to have been assumed that the case against her might be changed from one form to another, and the jury might then be left to say on which they would convict. I think the prisoner is to be indicted for the very offence she has committed, and it is the duty of the judge who tries the case to point out the difference between the different offences. Was any person shown to have been with the prisoner who had anything to do with the crime. The judge tried the case as one of larceny; at the close of the evidence he told the jury there was not sufficient evidence to convict on the second count. In my opinion he was right. I understand that what he did amounted to a withdrawal of the second count, and an intimation to find on the first. It is said it is a right of a jury, when the judge says a case falls within one class of cases, to take a different view from the judge. I do not adopt that view. I do not wish to say there was no evidence of receiving, but I think it hard to see what it was. I think the two confessions relied on are consistent with the crime of theft, and not at all satisfactory evidence of the crime of receiving. I feel much difficulty in this matter, for I think no third person was shown to be connected with the crime. If a jury will convict a man without evidence, and against the direction of the court, can it be said that a judge is bound to accept and receive such a verdict against all reason, evidence, and justice. I cannot assent to the doctrine that the life or liberty of the subject is to depend on anything else, but the principle of justice. All questions as to evidence are for the judge; and the validity of the conviction was for the judge; if not, when some evidence was improperly received, the jury might insist to convict upon it. I do not lay down there was no evidence of receiving, but I think the right verdict would have been for larceny. In *Reg. v. Wardroper* (Bell C. C., 250), where the jury found the prisoner *guilty of receiving, and the judge at the trial [282 declined to leave it to the jury to find whether the prisoner received the stolen property from her husband or in his absence, it was held the conviction could not be supported. As to the second question, I think I am excused from giving an answer to it. It seems to me to be a question to tell the learned judge what he ought to have done at the trial.

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Such a question is a hypothetical one, and not a practical one, and need not be answered (*Reg. v. Whitehead*, L. Rep., 1 C. C. R., 38, per Pollock, C.B.). This question is as to the duty of the judge and hypothetical questions are embarrassing, and we need not answer them. I believe that against his conviction he accepted the verdict of the jury. In the way I have explained I get rid of the second question. The court are of opinion on the first question there was some evidence to go to the jury, but I think the true case was on the other count. I hope such a thing will not occur often. It has been said a jury may deal with evidence as they please. I am not of that opinion. I do not dissent from the opinion of my brethren, though I do not assent. As to the second question I do not answer it.

Conviction affirmed.

[13 Cox's Criminal Cases, 282.]

MAIDSTONE SUMMER ASSIZES.

Friday, July 14, 1876.

(Before Baron Huddleston.)

REG. V. JAMES BAULD, THOMAS JONES, ALFRED GIRST, WILLIAM GIRST, GEORGE KENDALL, CHRISTIAN SPOERER, CHARLES BRAND, WILLIAM STRINGER and ARTHUR HODGSON.

Conspiracy—Employer and Workmen Act, 1875—Picketing is an offence within this statute.

Picketing, "watching" and "besetting"—or watching and annoying men who may be inclined to work, is an offence within the Workmen's Act of 1875.

THE indictment contained thirty-five counts, and in substance it charged the defendants with having unlawfully conspired together by means of violence and intimidation and divers other unlawful means, and by watching and besetting the premises of Messrs. Easton and Anderson, engineers, of Erith and Southwark, and the approaches 283] thereto, to compel divers workmen *then employed by Messrs. Easton and Anderson, or who might thereafter be willing to offer themselves for employment, to quit their employment and abstain from working or offering themselves for work to the said firm. There were also counts charging the defendants with conspiracy together by watching and besetting the premises of Messrs. Easton and Anderson to endeavor to compel Messrs. Easton and Anderson to

alter the mode of carrying on their business, and to pay by time and not by the piece.

Ballantine, Sergt., *Poland* and *Besley*, for the prosecution.

Parry, Sergt., and *Croome*, for the defendants.

Parry, Sergt., applied for a postponement of the trial: As to the charge of "watching" and "besetting" your Lordship is aware that there are two views which may be taken. If it were merely done for the purpose of persuading the men to quit their employment it would not be illegal.

HUDDLESTON, B.: I cannot assent to that view of the law. The statute allows watching or attending near a place for the purpose of obtaining or communicating information, but this is the only exception.

Parry, Sergt.: I accept your Lordship's correction, and I am sure that the men will accept your Lordship's exposition of the law now that they have heard it. My application is that this indictment be postponed, and if this application be granted, I am now, after what has fallen from your Lordship, authorized to state that the picketing shall wholly cease, and I trust that your Lordship will accede to the application, as neither the interests of the defendants, nor the prosecutors, nor the public, will in any way suffer from it.

Ballantine, Sergt.: One of the grounds of objection is that the system which forms the main subject of this indictment is still in force. Your Lordship is quite aware that there is an organized system by persons out upon strike of watching the advent of persons who want to obtain employment with the masters they have struck against, and preventing them doing so by means no doubt illegal under this indictment. This system is going on at the present time, and it would be a matter to us extremely serious if we allowed the trial to be postponed. I have never believed the view taken by my learned friend Sergeant *Parry* to be the law. Your Lordship has now given an intimation of what your Lordship considers to be the law on this subject of picketing, and with that view I entirely concur. I accept in the most unreserved manner what my learned friend says and that the intention of the men represented by him would be fully carried out; but I am obliged by the representations made to me by those who instruct me to put before your Lordship in the strongest possible manner the grounds upon which we oppose a postponement of this trial. I am quite sure that it will be apparent to your Lordship, with

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a large body of witnesses in a case of this kind, how ex-284] tremely difficult it must be to keep them *together even upon one occasion, and this has been done only after great labor and considerable trouble, and after an interval of several months it would be next to impossible to get them together again.

HUDDLESTON, B.: I believe there are a great many persons who are interested in this question, and that there is a very great desire on the part of all parties interested to keep within the pale of the law. I believe this to be a feeling common to both masters and men. I think the men are very often found to be anxious to keep within the pale of the law. They think they have certain rights, and undoubtedly they have certain rights. Independently of the law passed last session there has in recent years been a great change in the law of conspiracy, and the whole of the law relating to trade combinations has undergone a very great change indeed. The act passed last year prevents any person being indicted for a conspiracy except in particular cases, that is to say, any act in contemplation or furtherance of a trades dispute between employers and workmen shall not be indicted as a conspiracy, unless it is an act which, if committed by one person, could be punished as a crime, and the statute then defines what a crime is. The statute then goes on to declare what persons are not permitted to do. They have no right to compel any other persons to abstain from doing any act which they have a legal right to do, and for that purpose to watch or beset the house or other place where such person or persons reside. Now on this rests the great question of picketing. No doubt the men are in the habit of taking an erroneous view of what they may be permitted to do in the shape of picketing, and it is a very serious question no doubt. They have no right to watch or beset the house or other place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, for the purpose of compelling any person to abstain from doing that which he has a legal right to do. Then, although the act says watching and besetting shall not be permitted for the purpose of compelling persons in such cases, there is the other side of the question, which is this, where the men watch merely to obtain or communicate information. The meaning of that is this. When the men combine, as they have a perfect right to do, they may say, "We won't work except for certain wages, we won't work except upon certain terms," and they have a right to agree together for this purpose; but,

there may be amongst their number some persons disposed to enter into an arrangement to receive money from the funds raised for the purposes of supporting the strike and then to go to work and also get wages from the masters at the same time. This would certainly be a hardship of which the men might complain; and, therefore, the Legislature enacted that if their watching and besetting was only for the purpose of watching their own men who should so act, it is not a watching and besetting within the meaning of the act *of Parliament. But this watching and be- [285 setting is a very serious offence unless it is confined to merely obtaining and communicating information, and this cannot be too well known. I must consider the application made to me by the men for the postponement of this trial. I understand them to say that they received no information of the seventeen new witnesses to be called until last Monday, or of the new counts in the indictment.

Ballantine, Sergt.: Your Lordship will find no new matter. What are spoken of as new counts charge the defendants with watching and besetting for the purpose of preventing Messrs. Easton and Anderson conducting their business upon the piece-work principle; watching and besetting for the purpose of compelling Messrs. Easton and Anderson to pay by time.

HUDDLESTON, B.: I understand there are only four new items.

Besley: Seventeen, my Lord.

HUDDLESTON, B.: But notice of them was given. An intimation was, as I understand, given at the time of the committal by the justices that other witnesses would be called. There is, I apprehend, no dispute upon the question of fact.

Ballantine, Sergt.: No postponement of this trial can be consented to by the prosecution, and apart from this I am quite sure that it would not be beneficial to the men themselves, and further my friend, the gentleman who instructs me, urges upon me that I should endeavor to convey to your Lordship in the very strongest manner possible, that from the nature of this case out of the seventeen or eighteen witnesses who are here to-day under subpœnas, he would not, if this application for postponement be granted, be able to avail himself of even six or eight on a future day, and so strongly does he feel this that he is perfectly willing to make an affidavit to that effect, and he instructs me to offer the most strenuous objection to this postponement. I urge that there can be no dispute as to the facts and it is a matter of

great public importance that the law upon this subject of picketing should be declared. Upon this ground I have humbly to object to this postponement.

Parry, Sergt.: I urge that the whole of these men are still in the employ of Messrs. Easton and Anderson.

HUDDLESTON, B.: When this case was before the justices was any objection taken under the act to their dealing with the case summarily?

Parry, Sergt.: No, my Lord, the defendants were summoned for conspiracy. These new witnesses make out the charge of conspiracy, and I am almost defenceless. I do not believe myself that public justice would suffer in any way by postponement, and as regards the defendants themselves, I am perfectly certain they will implicitly carry out the promise I have made, and that picketing of every sort or kind will be done away with at once. On Monday next all picketing shall cease. All the persons who are in this particular firm's employment will remain there. The 286] neighborhood will be at perfect peace, and I cannot conceive that Messrs. Easton and Anderson themselves would consider themselves hindered by this postponement, and I will say that the delay in giving the defendants this information, considering the long lapse of time between the committal and last Monday is unexplained, and I cannot but think that the names and proofs of these witnesses might have been furnished before, and so I cannot help thinking that the prosecution has placed itself in a difficulty by its own conduct. That these witnesses may be inquired into is my one ground for making this application; but, I am perfectly content to leave it in your Lordship's hands, and shall be only too happy to abide by whatever your Lordship decides.

Ballantine, Sergt.: As counsel for the Crown, I do not know how far I am justified in waiving evidence. But I beg to observe that the application of my friend appears to rest on only one portion of the case. I have my client's imperative instructions upon the matter, and he is prepared if it is insisted upon to abandon all the counts my friend objects to and even the new witnesses, rather than this case should be postponed for several months.

HUDDLESTON, B.: On considering this matter very carefully as far as I am personally concerned I should only be too happy to accede to it. I cannot help thinking, however, that an important question such as this matter should be decided when it is ripe for consideration. Except upon the very strongest grounds I should not feel justified in enter-

taining the application which has been made. If I was satisfied that the defendants would suffer, I should think that they ought to receive every indulgence, and certainly if I thought, or if it appeared to me, that their interests would be in any way prejudiced materially, I certainly should accede to the application. But I see no reason to suppose that this will be the case. When these questions unfortunately arise between masters and men there are always two sides of the question. The interests of the men are of course to be fully considered, but the interests of the employers must also be considered, and it is of vast importance that this should not be lost sight of. We very often find that there is a mistaken notion on both sides as to the extent to which either party may go, and where this is so it is important that the matter should be decided as soon as possible. Now Brother Ballantine, on behalf of the prosecution, lays before me sufficient grounds to make me consider cautiously the appeal put forward by Brother Parry, and I cannot help thinking that this matter should be investigated at once. It was fully investigated so far back as April, before the magistrates, and an intimation was then given by the solicitor for the prosecution that further charges would be gone into, and substantially the defendants knew what was the case they had to meet, and if they had any doubt upon the subject they had full time to make an application to the prosecution. Last Monday, the case being ripe, the gentleman acting for the prosecution, *knowing what ought to be done, saw that it was [287 done; that is to say, he directed that the information as to the new witnesses should be given, and when it was known what this new evidence was, no application was made. If any application of this sort had been made on Monday I should have either directed that further information be afforded or a postponement of the trial until the end of the assizes; but no such application was made, though they would have been able to have made it before the further information was received, and I think it not too much for me to say that the defendants ought to be ready to day. Under the circumstances, I feel it a paramount duty that this matter should be investigated and decided, and this I say in the interests of the defendants themselves. I think that it would be a most painful thing that it should hang over their heads until next March, for even if there should be a Winter Assize, they could not be tried until the March Assize, they being all on bail. Therefore I think this matter ought to be investigated. I consider it ought to be tried in

the spirit which I am sure actuates all the investigations of a court of justice, because I am sure that this trial arises from no vindictive feeling on the part of the masters, and I hope, from what I have seen from the depositions, that this question is one upon which the men have taken an erroneous view altogether of their particular rights. The law of conspiracy with reference to differences between masters and men has undergone a very great alteration, and the men know perfectly well that the Legislature met them in the most perfectly honest manner, and invited their assistance in considering what should be the law on this subject, and the act of Parliament passed last session was the result of anxious deliberation on the part of all parties, no matter to which political party they belonged, and in that deliberation they were assisted by those able representatives of the working men who habitually advocate their cause in Parliament, and also by delegates elected from their own body, and this deliberation led those who prepared the bill to frame it so that the men might understand the length to which they would be justified in going in support of what they felt to be their rights. I am one of those who held that the men had very good grounds to urge some alteration in the statute law as it had existed, and I may say that a milder and fairer exposition of the law never was made than appears in the statute under which this indictment is framed. And I would invite the men in their own interests to consider how much the Legislature has done for them, and if they themselves feel that, by their own acts, they have gone beyond the law which they themselves assisted in making, to do what, I may say, they are bound to do, admit it frankly, and place themselves under the law as men who are ready to accept the consequence of that act. If on the other hand they fail to recognize any error and hesitate to admit it, and claim to be justified in the course they have adopted, they should be ready, with the very able legal 288] assistance they possess, to *have this matter fully investigated, and for my own part I will give it my best consideration, and the jury and myself will try it out with the greatest care. But I cannot accede to the application for the postponement which has been made to me.

A consultation here took place between the counsel.

The defendants Bauld and Kendall pleaded "not guilty," and all the others "guilty."

Parry, Sergt.: In reference to those of the defendants who have pleaded guilty I have received an intimation from my friend, Sergeant Ballantine, that with your Lordship's

permission he does not propose to ask that any punishment should be passed upon them ; but he would ask that they be required to enter into their own recognizances to come up for judgment if called upon to do so, and I earnestly hope that this course may meet with your Lordship's assent. On the part of those I represent I am desired to say that this was a dispute which had arisen between the masters and the men upon what the men considered a most important principle, that is, the principle of piece-work and time work. These workmen were called upon before the strike to engage on piece-work by Messrs. Easton and Anderson, and one hundred and seventy of them declined, and all I am desirous of adding is this, to assure your Lordship that, whatever may have subsequently taken place, it was never for one moment present to the minds of these men to commit a breach of the law. But a breach of the law has been committed, and is now acknowledged by the defendants, and the observations which fell from your Lordship mainly induced the defendants to feel that a breach of the law had been committed, and to take the course they now have done. I have explained to them that this acknowledgment does not cast any slur or stain upon their characters, but it is a recognition by them of having done wrong, and an expression of regret for the wrong they have done. As far as they who were the leaders amongst them were concerned, their earnest intention was to avoid a breach of the law and to do anything they possibly could to avoid it, and they desired to carry on this strike strictly within the meaning of the act of Parliament ; and after your Lordship's explanation of that act I am sure they will in the future abstain from doing such things and seek to obey the law in the exact words in which your Lordship has laid it down. The observations made by your Lordship will be of the greatest service to them, and I am perfectly certain that they will have a beneficial influence.

Ballantine, Sergt.: There must be no further picketing of any kind.

Parry, Sergt.: As an undertaking was given upon the application for the postponement that no further picketing should take place, it will be almost unnecessary to repeat it ; but I do nevertheless repeat, and that in the most emphatic manner, that the picketing is entirely abandoned. Great have been the difficulties of these men, but I think I am not wrong in stating that after *this strike had [289 continued over four months only one act of violence as arising from it is to be found upon the depositions. Of course

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there have been antagonisms, but I trust there will now be no further ill feeling, and I am sure that the observations of your Lordship will have a beneficial influence on all concerned.

Ballantine, Sergt.: I feel extremely glad at the course these defendants have taken, and I was quite sure that it was the course my learned friend would advise them to take. In fact no one who had read the depositions could but feel that these persons had violated the law, and that what your Lordship had explained as the law ought to be the course followed by the men. The act of Parliament of last session is unquestionably most beneficial to them and one of the most lenient in the statute book, as it actually exempts workmen from charges to which other persons are liable, and when they feel how much has been done for them in this respect it should be sufficient, if there has been antagonism between them and their masters in the past, to make them work comfortably together in the future. I am exceedingly glad that they have acknowledged their error in such a manly manner, and as men have accepted their position, and from the manner in which they have pleaded I cannot help thinking that the plea has not been forced upon them by the circumstances in which they were placed, but from a desire to obey the law, recognizing what was due to the justice of the country and due to the masters, as English operatives ought to do. Appearing as I do for the masters, I am most anxious that it should be understood that in all the cases in which I have been instructed on their behalf they have shown a special desire to act fairly towards their men and not to show any hostile feeling. Of course there will be antagonism of interest; but all the masters have ever sought to do is to protect their men from watching and annoyance and to prevent following the men who were pursuing that which they had a perfect right to, and the pursuing of a system of annoyance which I feel very strongly the law of this country does not permit. The observations made by your Lordship before your decision not to postpone was arrived at are calculated to have a great effect, not only upon the minds of the men, but also by enforcing upon the masters a fair consideration of what is due to the persons whom they employ, and I do sincerely trust, after what has taken place, that this system of picketing will be wholly discontinued. I feel, however, that this trial will be of great service as having elicited the views taken by your Lordship, and which, I am convinced, are those held by all the judges of this country, for the men will in

future understand, when placing other men on picket, how extremely dangerous is the work they are attempting, and that they have no right to put persons on to watch and beset others, and under any circumstances that they had better abstain from doing so, as however good may be the intention, it is certain, in consequence of the temper of men, to lead to injurious results. As one of the counsel for the Crown and representing the employers, I do not wish for any *punishment to be inflicted upon these [290 men, and I do hope that the generous feeling which I believe to be inherent in Englishmen of all classes will now prevail, and that this conduct will not be repeated, and that hereafter the men will act in no way to the prejudice of their employers or endeavor to interfere with their fellow workmen in the due course of their business.

HUDDLESTON, B.: In reference to you, Bauld and Kendall, you are discharged. The learned counsel for the prosecution having very properly stated that, looking at the evidence, he does not feel justified in saying that your acts so connect you with the acts of the other men as to make it apparent that you were part of the combination with which the other men were charged. I must say that to me personally it gives a great deal of pain to see respectable men standing in the position of criminals, and I do hope, from the frank manner in which they have acknowledged their having trespassed beyond the bounds of the law, there is an indication, as far as they are concerned, not only not again to do it themselves, but to do more, to use that influence which, as men of intelligence, they possess over others, and prevent them from doing the same thing. The men should know this, that the law is now perfectly fair and equal as between them and the masters. I remember the time when a breach of contract was only a question of civil remedy as far as the master was concerned; but if the men broke their contract, they might be visited with imprisonment for three months, and were not allowed to give evidence in their own behalf. That was the law; but this act of Parliament, as I have already pointed out, is an act of Parliament which has undergone the greatest consideration. There was a commission granted in 1870 to consider the subject, and in consequence some of the most objectionable parts of the previous law were done away with. A subsequent statute was passed, and of this statute the men rightly or wrongly felt they had a ground of complaint, and the Legislature heard their complaint, and they recognized the right the men had to some alteration in legis-

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lation, and the act of last session was passed. I have had some experience in a recent case of this kind, tried at Nottingham, in which many of the men felt, and the principal persons among the men got them to fully recognize, in a manly and frank manner, the great desire on the part of the Legislature to consider the real grievances of the men.

Now, what I understand to be the dispute between you and the masters is this, that the masters want certain work to be done by piece-work, and certain hours, and you say—

Parry, Sergt.: There is no dispute as to hours, my Lord.

HUDDLESTON, B.: Well, it does not signify. The masters have a perfect right to say that, and the men have a perfect right to say "We won't do piece-work," and the law recognizes that every man has a right to be protected in that which he has a legal right to do, and which he has a right to abstain from doing; anything that is not an im-291] proper act. The master has the right *to say, "I will pay only such and such wages, and I require you to work certain hours, and if you choose to accept it you may." The men have a perfect right to say, "No; we do not intend to work for such wages and for so long a time." The masters have the right to give what they think fit, and the men have a right to agree amongst themselves what they will take. But while the law secures to them that right it imperatively prevents all from exercising tyranny to others, and while you may choose the arrangement of your own hours and terms, you have not a right to combine for the purpose of imposing upon others a restriction from which you claim to be exempt. And the same thing applies to the masters. A master has no right to take proceedings to require other masters to adopt his views; that is a legal offence. And the men have no right to prevent others doing what they think right, or doing what they themselves would wish, and it is for this purpose the law prescribes exactly what must not be done. You have a perfect right to advocate your own views by argument and reasoning, but the law says you must not do this: "You must not compel any person to abstain from doing any act which is not an act that he has no right to do." The law also says you must not do this: You must not use violence or intimidation either to a man, or his wife, or his children, and you must not injure his property. You must not persistently follow any person about from place to place. This being very much like picketing, in your own interest I would

urge upon you that picketing is a most dangerous course to adopt. You must not persistently follow a man. You must not in short "dodge" a man from place to place so as to interfere with his personal liberty to do what he likes. You must not hide his tools, or his clothes, or any property owned or used by him, or deprive him or hinder him of the use of them. All this is reasonable enough. You must not watch or beset his house, or his works, or their approaches. Now when this act of Parliament was under consideration, the men, through their delegates, urged upon the government then passing it that instances might arise where men might lawfully "watch and beset," and a proviso was introduced into this act which says, "Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." And this means no doubt that occasionally you may, in differences of this kind, find some who would, so to speak, be "traitors" to you who, while getting their share of the money raised for the support of those on strike, go and work as well and thus get money from both sides. You would, of course, wish to discover such men. But it must be a "watching and besetting" for some such lawful purpose to be within the meaning of the act. You will, however, see how difficult and dangerous it is in your effort not to do what is wrong, and to guard against the abuse of the *practice. If you wish by your own conduct to as- [292
sert your rights to "picket" you are almost certain to get into difficulty; for, whatever you may intend, there will be some among you who will go beyond what is intended as "watching and besetting" within the exemption of the act. This picketing in which you have been engaged is illegal. Your own advocate declares it to be so and it is so declared by the act of Parliament. I know perfectly well that it is said you did not intend to go beyond the act, and I believe you did not, and that you did not intend to do that which is criminal. You must feel, and any one who has looked at the depositions must feel, that there can be no doubt but that some of you at least have gone far beyond the law, and it is manly of you to acknowledge it. You have broken the law, and you are charged with a conspiracy. The law of conspiracy was not clearly understood, but this act of Parliament defined it and said that a combination by two or more persons to do an act which if

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done by one would be a crime is a criminal conspiracy. That is to say, you may agree between yourselves to take certain wages and to do certain work, but unless you agree to do some act which act in itself is a crime, it is not a conspiracy. But if you agree together to use violence to compel a person to do something he is not obliged to do, you combine to do an act which is forbidden by the law and it is an illegal conspiracy. It would be a most painful thing for the respectable men I see here to be put in Canterbury jail with all kinds of criminals for several months. Now, do let me point out to you that, while on the one hand you have gone beyond the law and very properly acknowledged your error, you must recognize the rights of others to do that which they recognize and think right. And let me say that, while I readily accede to the course suggested, that you enter into your own recognizances to come up to receive judgment when called upon to do so, I require it to be distinctly understood that all the proceedings which have given rise to this trial are to cease. You will only be called up to receive judgment if you violate the law, in which case you cannot expect any consideration so to be held out to you. If you violate the law you are liable to be called up and sentenced at any time. I have no doubt that you mean to abide fairly by what you have undertaken and to obey the law. Having regard generally to picketing and striking, depend upon it there are other and better means by which differences between capital and labor may be adjusted.

See 13 Eng. Rep., 440 note; U. S. v. Rindskopf, 6 Bissell, 259; People v. Powell, 63 N.Y., 88.

[13 Cox's Criminal Cases, 293.]

NORTH WALES CIRCUIT.

Chester Spring Assizes, 1878.

(Before Mr. Justice Lush.)

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*REG. V. JAMES BUCKLEY (¹).

Murder—Admissibility of evidence—Statement made by deceased in the absence of the prisoner—Motive—Deposition.

Where the deceased person, a constable, in the course of his duty, made, shortly before his death, and in the absence of the accused, a verbal statement in the nature of a report, to his superior officer (an inspector of police), as to where the deceased was going and what he was going to do; such report being material to the case for the Crown:

(¹) Reported by E. JULYAN DUNN, Esq., Barrister-at-Law.

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Held, per Lush, J., after consultation with Mellor, J., that such statement and report were admissible in evidence for the prosecution.

In order to prove malice or motive against the accused, the deposition of the deceased against him, taken before the magistrates on another charge, and for which he was afterwards convicted, was tendered in evidence, and

Held, admissible.

JAMES BUCKLEY, gardner, was indicted for the wilful murder of a policeman named James Green, at Morton, on the 24th of February, 1873.

H. S. Giffard, Q.C., and *F. F. Brandt* prosecuted; *Bowen*, Q.C., *Wynne Foulkes*, and *E. Julyan Dunn* appeared for the prisoner.

It seems from the evidence adduced that the prisoner, who lived in a small cottage some distance away from other houses, was a man who, for many years past, had borne an excellent character, but that in the previous year he had been prosecuted and convicted for larceny, mainly by the testimony of the deceased man Green, who had seen him commit the offence. After his imprisonment for such theft, the prisoner had been heard to mutter threats of vengeance against Green for the part he had taken in prosecuting him. On the 24th of February, *1873, in consequence of cer- [294 tain information given, Green, who was then on duty as police constable, met his inspector and made a certain statement to him, no one else being present at the time.

It was most important for the prosecution to get this statement before the court, inasmuch as the whole of the evidence for the Crown was circumstantial in its character, and as in fact Green had told the inspector that he was going that night, viz., the 24th of February, to watch the prisoner, and as the deceased was never seen alive after this conversation, excepting by a person who saw him a short time after dark that evening, on the road in what might be the direction of the prisoner's cottage; and as the body of Green was not found until two days afterwards, when it was discovered in the canal some distance off, and was covered with wounds.

The following evidence was given leading up to the statement in question:

Inspector Joseph Hulme, of Sandbach, said: I knew the deceased man, James Green, he had been in our police force about five years. I last saw him alive on Monday, the 24th of February, 1873, at 11.30 in the morning. If a constable was going on a particular duty he should report to me, if convenient. He might, in case of emergency, act without so doing. Green did make a report to me on that occasion of his intended duty that night. That report was verbal.

By *Bowen*, Q.C.: The meeting was quite accidental, and we had a general conversation. Constables do report at times to me what they are going to do in their own district: not always in writing. Green was one of those constables who possessed a little more confidence and had a little more latitude given him than others.

By *Giffard*, Q.C.: Each man had a conference point, and I met Green going to the place of meeting half an hour before the time.

By the JUDGE: Prisoner's house was in Green's beat; Green's duty was day and night duty on the 24th of February; from eleven to three in the day, and from nine to two at night.

Giffard, Q.C.: I propose to ask the question what the report was.

Bowen, Q.C., objected.

The JUDGE: I think it is admissible.

Bowen, Q.C., submitted that under the circumstances the report was not admissible, on the ground, amongst others, that it was mere gossip.

The JUDGE thought that the statement made by the deceased man was quite admissible, but went to the other court to consult with Mr. Justice Mellor on the point. After an absence of some minutes the learned judge returned, and said that his learned brother had no doubt at all of its admissibility, and the statement was therefore received in 295] *evidence; and was, that the deceased had had private information that the prisoner was at his old game of thieving again, and that therefore the deceased intended to watch his movements that night. Witness said to the deceased, "I will send a man to assist you about nine o'clock;" and deceased replied, "That will be too late, I will go about dusk, myself."

2d point. Afterwards, in the course of the trial, it being important to prove motive, it was proposed to read the deposition of the deceased, taken before the magistrates, when the charge of larceny against the prisoner was heard.

Bowen, B.C., objected to such evidence, saying it was immaterial to the issue.

The JUDGE, however, said: I don't know but that he might have been a witness for the prisoner. I must know the relations between them.

The magistrates' clerk then read the original depositions of Green, and which were to the effect that he had seen the prisoner commit the theft complained of, and that he followed him, and took him in custody with the stolen articles

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upon him. The prisoner was convicted of such theft and suffered punishment therefor a few months before the charge of murder was brought against him.

After a trial which lasted two days the jury found a verdict of

Not guilty.

Attorneys for prosecution: *Latham & Bygott, Sandbach.*

Attorney for prisoner: *Thomas Cooper, Congleton.*

[13 Cox's Criminal Cases, 296.]

NORTHERN CIRCUIT.

Liverpool Summer Assizes, 1876.

(Before Mr. Justice Lindley.)

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Depositions taken abroad—Absence of witnesses—Merchant Shipping Act (17 & 18 Vict. c. 104, ss. 268, 270.)

Witnesses whose evidence had been duly taken at New York by the British Consul General, under the 17 & 18 Vict. c. 104, s. 207, were seamen of a British sailing vessel, which was proved by affidavits to be still at sea, and none of the witnesses were likely to be in the United Kingdom for many months:

Held, that the affidavits sufficiently proved that the witnesses were out of the United Kingdom, their depositions were read, and the prisoner convicted and sentenced.

THOMAS STEWART, a man of color, though a British subject, was indicted, at the Spring Assizes, before Mr. Justice Brett, for having on the high seas on board a British ship called *The Neptune Car*, on the 24th of December, 1875, feloniously wounded one Richard Buckingham with intent to murder him.

The only witness then present was a Mersey river policeman who had received the prisoner into his custody from the captain of an American steamer at Liverpool, and at the same time he received a bundle of written depositions taken against the prisoner before the British Consul General at New York. When charged by the river policeman with assaulting with intent to murder, the prisoner answered, "I struck him, but I did not intend to murder."

Tidswell, for the prosecution, referred to 17 & 18 Vict. c. 104, s. 270, *Reg. v. Conning* (11 Cox C. C. 135), and after reading an affidavit to the effect that the vessel was at sea and the witnesses out of the United Kingdom, applied that the depositions might be sent before the grand jury, which was allowed, and a true bill was afterwards found.

(1) Reported by R. T. TIDSWELL, Esq., Barrister-at-Law.

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297] **Commins*, for the prisoner, afterwards applied for the prisoner's discharge.

BRETT, J., adjourned the trial to the next assizes, and ordered the prisoner to be kept in custody.

LINDLEY, J., at the next assizes, on a further affidavit of like effect to the former, ordered the trial to take place.

Tidswell, after the river policeman's evidence, applied that an officer of the court should read the depositions, which were lengthy, and which purported to have been taken in due course.

Commins, for the prisoner, objected to their being read, as it did not appear from the depositions, or in any way, that the consul at New York had taken any steps for sending the witnesses in accordance with his power under sect. 268 of the Merchant Shipping Act, and argued that it ought to have been shown that there had been some endeavor to send them.

LINDLEY, J., quoted the maxim "*Omnia presumuntur rite esse acta donec contrarium probetur*," and held them admissible, as they purported to have been taken in the presence of the accused, were duly signed and fully complied with the requirements of the act. They were then read by an officer of the court. From them it appeared that on the 24th of December, 1875, while the *Neptune* Car was at sea on a voyage from Rio Janerio to New York, the prisoner, who was cook, made an attack on the mate upon the latter attempting to send a retriever dog from on deck into the cabin, whereupon the prisoner went to the pantry, got a knife, ran after the mate, caught him, stabbed at him, and cut him several times, threatening to murder him.

The river policeman's evidence was that the prisoner, when charged in Liverpool by him, said "I did assault him, but I did not intend to kill him."

The prisoner was found guilty of wounding with intent to do grievous bodily harm, and his Lordship; on the following morning, after observing that he had considered the various points raised, remarked that it was an important case, as there was an impression abroad that offences might be committed on British ships with impunity, or with a reasonable hope of escape, if the witnesses were at sea and could not be present at the trial, and sentenced him to a term of seven years penal servitude.

IRELAND.

[18 Cox's Criminal Cases, 298.]

COURT FOR CROWN CASES RESERVED.

Tuesday, June 13, 1876.

(Before Morris, C.J., Pilles, C.B., O'Brien, J., Deasy, B.,*Fitzgerald, B., Keogh, J., and Lawson, J.)

REG. V. MURPHY (*).

False pretences—Obtaining goods for half bank notes.

A. was indicted for obtaining goods from several persons by false pretences to whom she had forwarded half bank notes, requesting goods to the value of the entire notes to be sent to her. She had not the corresponding half notes in her custody:

Held, that she was rightly convicted for obtaining goods by false pretences.

CASE reserved for the opinion of this court by Lawson, J.

The prisoner, Mary Murphy, was convicted of obtaining goods by false pretences at the Commission for the county of the city of Dublin.

The indictment averred that the traverser at Castle Pollard, in the county of Westmeath, did heretofore, to wit, on the 27th of November, 1875, send through the post to one John O'Connor, residing in the county of the city of Dublin, a written order and request note for the delivery to her, the said Mary Murphy, of certain quantities of tea and sugars of the goods and chattels of the said John O'Connor, and together with said written order and request note the said Mary Murphy then sent certain, to wit, two halves of bank notes by way of payment for a sum of £2 for the goods aforesaid. And the jurors aforesaid, upon their oath, do further say and present that the said Mary Murphy, on the day in the year aforesaid, unlawfully and knowingly did falsely pretend to the said John O'Connor that she then had in her custody and procurement for the satisfaction of the said John O'Connor certain halves of bank notes being the proper and corresponding halves *of the bank notes so as [299 aforesaid sent by the said Mary Murphy to John O'Connor, and that the same would in due course be sent by Mary Murphy to John O'Connor, by which said false pretences the said Mary Murphy then unlawfully did obtain from the said John O'Connor certain, to wit, ten pounds weight of tea and fifty-six pounds weight of sugar of the goods and chattels of the said John O'Connor, with intent to defraud. Whereas, in truth and in fact, the said Mary Murphy had

(*) Reported by CECIL R. ROCHE, Esq., Barrister-at-Law.

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not then in her custody or procurement for the satisfaction of the said John O'Connor the said halves of bank notes, being the proper and corresponding halves of the halves of bank notes so as aforesaid sent by Mary Murphy to John O'Connor, as she did then so falsely pretend to John O'Connor, and Mary Murphy then well knew the said pretences to be false, against the form, &c.

In two other counts the traverser was similarly indicted for sending half notes to Joshua Bewley and Hugh McNeight respectively. In each count, by direction of the court, the words "or procurement" were struck out. Evidence was given by Joshua Bewley, Hugh McNeight and several other persons, to the effect that the prisoner had written letters to the witnesses, inclosing half notes, and requesting that goods might be forwarded to her. The goods were sent, but the traverser would not send the second half notes. Several of the witnesses held the corresponding halves of the notes sent to the others. The police constables who arrested her the prisoner found several half notes with her. At the conclusion of the case for the Crown, counsel for the prisoner submitted that the indictment could not be maintained, as the pretence must be of an existing fact, and here the goods had been obtained upon a promise to send the other halves. Counsel for the Crown said there was evidence to sustain the count laid that she had the corresponding halves in her custody. The case was left to the jury, who found the traverser guilty. The learned judge (Lawson, J.) then stated a case for the court, the question being "if the court should be of opinion that the evidence sustained that count of the indictment which alleged a pretence that she had the half notes in her custody, the conviction to be affirmed, if not, the conviction to be quashed."

O'Moore, for the traverser: The sending of the half bank notes and obtaining the goods on the faith that the corresponding half notes would be duly sent, is not an obtaining of goods by false pretences. It was at most merely a promise to pay for goods on delivery, and such a promise is not a false pretence of an existing fact (*Reg. v. Goodhall*, R. & R., 461).

FITZGERALD, B.: The first question is, what was the intention with which the half notes were sent?

O'Moore: The sending was merely a promise to pay.

PALLES, C.B.: How could the traverser keep that promise when she had parted with the other half notes?

O'Moore: The promise was not to pay by sending the

second *half note, but to pay in some manner, and the [300 half note was sent merely as a security for the observance of the promise.

O'BRIEN, J.: But the traverser had sent the corresponding notes away, and the jury might reasonably infer that the representation was to send the second half notes, and that was a false representation, and the one upon which the goods were in fact obtained.

O'Moore: The test to apply is, was the sending of the half note merely a promise to pay in the future? If so, it is not a false pretence, it was merely a security. It is not a false pretence on the face of it, like a flash note. It is quite possible that the traverser made a mistake in sending the half notes. The evidence at the worst is consistent with the innocence of the traverser.

KEOGH, J.: That might be but for evidence which appears from the cross-examination of Hugh McNeight. He says that the traverser told him she had sent the half notes corresponding to those he got to some one else. He also says that six of the half notes sent to him corresponded with six sent to O'Connor.

Murphy, Q.C., with him O'Brien, Q.C., for the Crown: The question in this case was one for the jury. They were to say with what intention the half notes were sent. In *Reg. v. Bryan* (7 Cox C. C., 312), although overruled in that particular, lays down the law with great clearness. He says, "I say nothing on the subject of exaggeration except that it appears to me it would be a question for the jury, in each case, whether the matter was such ordinary praise of the goods (*dolus bonus*), as that a person ought not to be taken in by it, or whether it was a representation of a specific fact material to the contract and intended to defraud." In this case the sending of the half notes was an intimation that the person from whom the goods were bought was not to rely upon a mere promise to pay. It was an intimation that the transaction was to be a ready money one, and if the intimation of such a state of facts was made with intent to defraud and induce parties to part with their goods, that is a false pretence.

MORRIS, C.J.: The only question is, did the sending of the half notes imply the traverser had the corresponding halves?

O'BRIEN, J.: You say, Mr. Murphy, that the mere act of sending the half notes was a representation that the traverser had the other halves?

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Murphy: Yes, upon the authority of *Reg. v. Giles* (34 L. J., M. C. 50).

O'Moore in reply: The case of *Reg. v. Giles* is different from this. There the traverser falsely pretended she had power to bring back A.'s husband over hedges and ditches, which she had not. Here the traverser had power to pay.

MORRIS, C.J., delivered the judgment of the court: We are all of opinion that this conviction be affirmed. There was evidence to go to the jury of the pretence that the traverser had half notes in her possession corresponding to 301] those she sent. I take the *first count as it is the simplest in its facts. It states the grand jurors "present that Mary Murphy, on the 27th November, 1875, sent to John O'Connor a request for goods, and with the request two half notes by way of payment for a sum of two pounds for the goods aforesaid, and the jurors further present that the said Mary Murphy unlawfully and knowingly did falsely pretend to the said John O'Connor that she then had in her custody for the satisfaction of the said John O'Connor, certain half notes, being the proper and corresponding half notes of the halves so sent as aforesaid, and the same would be sent in due course, by which false pretences she obtained the goods, whereas the said Mary Murphy had not then in her custody for the satisfaction of the said John O'Connor the corresponding half notes." Well, the jury found that the half notes were sent with the intent to defraud John O'Connor of his goods, and the request for the goods along with sending the two half notes was evidence from which the jury might infer that there was a sort of silent statement by Mary Murphy that she had the corresponding half notes ready for the satisfaction of O'Connor. It is plain that was O'Connor's view of the matter, and, indeed, it would most naturally be anybody's view under the circumstances. But it even appeared that on the 25th of November, two days before the traverser sent the money to O'Connor, she had forwarded the corresponding notes to George Jack. This is not only evidence against the prisoner but overwhelming evidence, and all in one way. The conviction therefore is confirmed.

Conviction affirmed.

IRELAND.

[13 Cox's Criminal Cases, 302.]

COURT FOR CROWN CASES RESERVED.

Tuesday, June 18, 1876.

(Before Morris, C.J., Pilles, C.B., Keogh, J., O'Brien, J., Fitzgerald, B., Deasy, B., and Lawson, J.)

*REG. V. NOONAN (').

[302

Rescue—Seizure by special bailiff—Custody of goods seized—Assistants of bailiff.

Where goods were seized under a warrant of the high sheriff addressed to a special bailiff, grounded on a writ of *fi. fa.* from one of the superior courts, which warrant conferred no authority on the special bailiff to employ assistants, and the goods were rescued from the custody of the assistants, it was held that an indictment was not sustainable for "by violence and threats of violence, compelling" the special bailiff to abandon the seizure of the goods (Morris, C.J., Keogh, J., and Lawson, J., *dissentientibus*).

WILLIAM NOONAN was convicted at the Limerick Quarter Sessions on the 6th of January, 1876, on an indictment charging him with having on the 9th of December, 1875, "by violence and threats of violence, compelled one Patrick Kelly to abandon the seizure of two iron plows, which he the said Patrick Kelly had then seized under and by virtue of a warrant of John B. Massey, high sheriff of the county of Limerick, directed to him the said Patrick Kelly, and grounded on a writ of *fi. fa.* of the Court of Exchequer." It appeared in evidence that by the warrant Patrick Kelly was appointed special bailiff, at the request of the plaintiff, in a certain cause of *James Fitzgerald v. John Noonan*, to execute a writ of *fi. fa.* in the said cause against the goods of the said John Noonan. The warrant was directed to Patrick alone, and contained no authority to him to employ assistants. It appeared also that at 3.30 p.m. on the 9th of December, 1875, Patrick Kelly, accompanied [303 by three men, named O'Neil, Morony, and Grady, seized, by virtue of the warrant, the goods mentioned in the indictment, at the residence of John Noonan. Kelly produced and read the warrant to John Noonan, and having seized the goods, left them in charge of the three men named, and then went away, taking the warrant with him. The traverser, who was a son of John Noonan, came to his father's house about an hour after the seizure, and endeav-

(1) Reported by CHAS. R. ROCHE, Esq., Barrister-at-Law.

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ored to retake the goods. He did not then succeed, and left the house, but returning about one o'clock at night, rescued the goods, driving away the three men left in charge by Kelly. Kelly had not returned from the time of the seizure until after the retaking. No evidence was offered for the prisoner, but at the close of the evidence for the Crown, the chairman was called on to direct an acquittal on the ground that the warrant was directed to Patrick Kelly alone, and did not authorize him to delegate his authority, that consequently the three men in possession of the goods were trespassers, and had no legal right to be on the premises, and that the averment in the indictment that Patrick Kelly had been compelled to abandon the seizure had not been sustained by the evidence, which showed that Kelly was not present at all at the time the alleged offence was committed, and that the possession of the goods of the men left in charge could not under the circumstances be said to be the possession of the bailiff.

Falkiner, Q.C. (with him R. L. Dames), for the Crown: The only question to be considered is whether the indictment can be sustained at common law. The act of the traverser was subversive of the course of public justice. Kelly was acting legally, and it is merely necessary to prove that he was in possession of the goods seized, and that he was compelled to give up that possession. Although Kelly put other persons in charge of the goods he had seized, and who were not named in the warrant, that was not a delegation of his authority, it was merely the delegation of an act. The possession of the men from whom the goods were taken was the possession of the bailiff, and the possession of the bailiff was the possession of the high sheriff. The retaking of the goods seized was a retaking from the high sheriff and as such was indictable at common law. Therefore, the only question is, was there evidence to support it? Kelly had been in possession of the goods under the *fi. fa.*, his leaving them even unguarded would not amount to an abandonment (*Bannister v. Hyde*, 2 Ell. & Ell., 627). They still remained constructively in his possession. Kelly would have been justified in re-entering by force (*Eagleton v. Gutteridge*, 11 M. & W., 465). It is not necessary for a landlord distraining goods to leave any one in possession of them (*Swan v. Earl of Falmouth*, 8 B. & C., 456). But in fact Kelly retained possession of the goods by the three men he left in charge. It was not necessary these men should be named in the warrant to enable him to 304] do so. These men *were bailiffs *de facto*, if not *de*

jure, and their possession was good (*Parker v. Kitt*, 1 Lord Raymond's R., 658). The point raised below was that these three were trespassers, because they were not named in the warrant. The violent retaking from these men was a violent retaking from the bailiff, and the evidence supports the indictment.

No counsel appeared for the prisoner.

LAWSON, J.: I am of opinion that the conviction should be sustained, on the ground that the facts proved in evidence disclose an offence at common law.

DEASY, B.: I have arrived at a contrary conclusion, for Kelly was not present when the transaction took place for which the prisoner was convicted. I never heard of a man being assaulted vicariously, or being threatened to be assaulted vicariously.

FITZGERALD, B., concurred with Deasy, B.

O'BRIEN, J.: I am of opinion that the conviction should be quashed, and I do not think there was any evidence to show that Kelly was compelled to abandon possession.

KEOGH, J.: I hold that the conviction should be sustained. Although the indictment was loosely framed, I am of opinion that there was a rescue, and that at the time the goods were in the possession of Patrick Kelly by his servants.

PALLES, C.B.: I am of opinion the conviction should be quashed. I offer no opinion whether the indictment was good or not, but I do not consider it was proved.

MORRIS, C.J.: The majority of the court are of opinion that, in any aspect of the case, the conviction should be quashed. But I may add my opinion to that of the minority that this indictment should be sustained. There is no doubt there was a legal seizure by the sheriff's special bailiff, that the goods were in legal possession at the time of the seizure, though he called in assistance, without which he could not retain the possession of the goods.

Conviction quashed.

[13 Cox's Criminal Cases, 305.]

HIGH COURT OF JUSTICE.

Queen's Bench Division. February 25, 1876.

(Before the Lord Chief Justice (Cockburn), and Mellor and Field, JJ.)

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*REG. V. "THE WORLD."

Libel—Criminal information—Practice—Compromise—Apology.

The court will not sanction applications for criminal information in cases of alleged libel if resorted to for the purpose of extorting an apology.

All excuses for the publication of a libel, as accidental error, inadvertence, and such like, should be promptly made.

It is not enough to say we were "misled," nor is "personal malice" material. To repeat a malignant scandal floating about society, although with no intent to injure any person in particular, is sufficient to support a criminal information.

A libel of a serious character being brought before the court, it will not sanction a compromise between the parties, but the prosecution once instituted must take its course; the object of such a proceeding being not the vindication of character, but the repression of scandalous libels. (Per Cockburn, C.J.)

In future, the court will lay down a stringent rule that in such cases the counsel who applies for a criminal information shall give an undertaking on the part of the prosecutor to proceed with the prosecution in order to ensure its being carried to its legitimate conclusion.

A RULE NISI had been obtained on the part of the Right Hon. Edward Horsman, M.P., for a criminal information against the publisher of The World newspaper for an alleged libel.

Sir *H. James*, Q.C., *Hawkins*, Q.C., and *Green*, for the prosecutor.

Parry, Sergt., and *Lewis*, for the defendant.

The language of the libel is not material to the present report. It was admitted to be a libel. The prosecutor, Mr. Horsman, had filed an affidavit expressly denying the imputations made upon him.

Parry, Sergt., for the defendant, said that, having read the affidavit of Mr. Horsman, he had no hesitation in saying that his client very much regretted having inserted the article complained of, and he desired on his part, and on the part of the proprietors, most distinctly to withdraw all imputations against Mr. Horsman. Upon reading his affidavit they felt that there was no foundation for the article inserted and that they had been misled in inserting it. They very much regretted its insertion and they begged sincerely to apologize to Mr. Horsman for its insertion.

THE LORD CHIEF JUSTICE: It imputes to him conduct of the basest and most dishonorable character and this is not a proceeding to be resorted to for the purpose of extorting

an apology. If a person comes to this court with a well-founded cause of complaint, which entitles him to ask for a criminal information for a libel of a most serious nature, very seriously affecting his character, this court should not be asked to sanction a proposal for withdrawal from the prosecution on withdrawal of the charge, but the prosecution should take its course and the party must take the consequences. I do not think that we should be justified in allowing that course to be taken in the case of a libel assailing character as this does.

Parry, Sergt., knew that such was the view of the court, and he had so informed his client, who had placed himself entirely in his hands. The terms of the libel, however, were not such as that personal malice could be inferred.

The LORD CHIEF JUSTICE: It does not matter to the individual assailed whether there was "personal malice" or not. If you tear a man's character to pieces it is nothing to say that you did it "by mistake."

Parry, Sergt.: But if a journalist, by accident or mere mistake, makes a charge which he finds to be erroneous—

The LORD CHIEF JUSTICE: If he can show that it was inserted by mere accident, or that some one who supplied the scandalous matter wrote it under some mistake, it might be different, but here it is not so.

Parry, Sergt.: No doubt the proprietor of a paper is legally liable for libels inserted in it.

The LORD CHIEF JUSTICE: And morally so.

Parry, Sergt.: Legally and morally liable for the insertion of libellous paragraphs; but if they have acted under an honest error, and they at once, upon complaint, come forward and offer an apology to the party complaining—

The LORD CHIEF JUSTICE: But they do not do so until after a rule for a criminal information has been granted and is hanging over their heads. It is not as though it had been offered at once.

Parry, Sergt.: Until the rule for a criminal information was granted the facts were unknown to the defendants, and it was not until they had read Mr. Horsman's affidavit that they were aware what was complained of.

The LORD CHIEF JUSTICE: If you could show that you had been misled by information on which you had well-founded reasons for relying and that you attacked the applicant's character under an honest impression of the [307 truth of the charge, and with an honest intention to promote the public interest, it would be otherwise. But you published this accusation, which is sufficient to destroy his

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character and to make people shun him as guilty of the basest conduct, and it is not enough then for you to say that you are sorry for it and that there was no foundation for it.

Parry, Sergt.: What you say, my Lord, will have no doubt the most beneficial influence on the public mind and especially on those who are responsible for the conduct of public journals. But I hope the court will be content with the expression of these views and will allow the parties to take the course which they now, with your permission, propose to take.

The LORD CHIEF JUSTICE: It is the old story—public writers scatter scandal abroad and make the most serious imputations upon character; and it is not enough then for them to say that they were "misled" and that there is no foundation for the imputations made, when it turns out that they were made without the least foundation and upon mere imagination.

MELLOR, J.: There is always a natural reluctance to come forward in such cases, and there were many cases, therefore, in which libellers escaped punishment. He quite concurred with the views of the Lord Chief Justice.

Parry, Sergt.: In this case Mr. Horsman was prepared to take a generous course, as became a man in his high station, and his character would not suffer by taking that course, which he hoped, therefore, he would be allowed to take.

Hawkins, Q.C., for Mr. Horsman: He had put himself into the hands of his counsel and they had given the matter the most anxious consideration. Mr. Horsman had made the application with great pain, but under a sense of duty, in order to vindicate his character against a most serious attack upon it. There was no reason to suspect the sincerity of the apology which had been made, nor to suspect that the defendant had been actuated by any personal malice.

The LORD CHIEF JUSTICE: It is not material that there should be personal malice. But a man who chooses to pick up every malignant bit of scandal which floats upon the surface of the scandal-loving part of society is responsible for it. It may be done without any desire to injure any one in particular—that is, with no desire to injure one more than another; but if he chooses to minister to the morbid taste of a certain portion of the public for scandal and slander, it is not enough to say that he hates no one in particular and has no desire to injure one person more than another. His purpose is to pick up anything by which to assail per-

sonal character, merely because it is the taste of a certain portion of society, and it is nothing to say that he has no particular malice against any individual.

Hawkins, Q.C., felt the force of these observations, but the reasons which operated upon Mr. Horsman's mind in assenting *to the course which his counsel—in whose [308 hands he had placed himself—suggested, were these, that he had no *animus* against those who had assailed him, and that his only object was to vindicate his character; and that, having done so, he was satisfied, because satisfied that his character could no longer be assailed.

The LORD CHIEF JUSTICE: I can quite understand that he, having vindicated his character, is not animated by any vindictive feeling; but we stand in a different position. With us it is not a question of the vindication of character, it is one of public justice. Here a libel of a most serious character is brought before us and the question is whether we shall sanction the compromise between the parties, or whether the prosecution, having been once instituted, ought not to take its course, its object being, not the vindication of character but the repression of scandalous libels. It has been too much the practice for the applicant to come and say he is satisfied, having obtained an apology; but the question is whether, there being a serious offence against the law, the proceeding ought to be allowed to stop and whether we ought to listen to any proposals to compromise so serious a case.

Hawkins, Q.C., ventured to take exception to the use of the word "compromise."

The LORD CHIEF JUSTICE: But it is a "compromise," and I repeat the term, as instead of carrying on the prosecution against the party who has been guilty of such an offence, so that he may suffer the punishment due to his offence, you are satisfied with something which is a salve to your client's character, but does not get rid of the offence against the public. It is a "compromise" which we cannot, it may be, prevent, but which we cannot sanction; for I feel that in cases of serious libels like the present, merely to use the process of this court in order to obtain an apology is what the court cannot consent to. Where a party can show that he has been misled into the publication of the libel—that it has been asserted without his concurrence or knowledge—or where he offers any other reasonable explanation or excuse, it may be just that this should take place. But in serious cases like this we must in future, in order to prevent such compromises, lay down a stringent rule that the

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counsel who applies for a criminal information must undertake that it shall be tried and carried out to its ultimate conclusion. Otherwise, it is obvious, it is allowing the process of the court to be used solely for private purposes, and the process of the court ought not so to be used. It ought not to be used for any purpose which falls short of what is due to public justice and the vindication of the law.

Hawkins, Q.C.: Mr. Horsman felt it due to his character to make the application to the court as speedily as possible, in order that he might deny upon oath the imputations made against him; and so far as his character was concerned, his object was obtained by a retraction.

The LORD CHIEF JUSTICE: Just as in the case of stolen 309] goods, *the object of the prosecutor is attained by the restoration of the goods; but the court does not sanction that.

MELLOR, J., said no doubt the applicant's personal object was attained. But what the court were thinking of was quite different from that, and regarded the public interests, and for the future it would be necessary to make some stringent regulation in order to insure the attainment of the other object, which regarded the interest of the public. It was not a proceeding to be resorted to for the purpose of extorting an apology or retraction, without any matter of excuse or explanation to justify the court in stopping the proceeding.

Sir *H. James*: Mr. Horsman had placed himself entirely in the hands of his counsel and the responsibility for the course taken rested with them. In commencing the proceeding, Mr. Horsman was actuated by the sincere desire to vindicate his character and had no idea of halting or hesitating in the course necessary for that object. But that object having been attained, his counsel, who naturally had regard to his interests, did not think it incumbent upon them to advise him to persist in the proceeding, and they hoped, therefore, that the court would allow that course to be taken which they had advised and would not think that he was bound to carry on the prosecution when its object was attained.

The LORD CHIEF JUSTICE: We cannot compel the prosecutor to go on, and therefore, in that sense, we must allow the compromise to take place. But I hope it will be understood that we take no part in it; and if this court is resorted to in cases of flagitious libel merely for the purpose of vindicating the character of the individual, it will be incumbent upon us, in order that our process may not be used simply

for private purposes, to require, before we allow the proceedings to be instituted, an undertaking by counsel on the part of the prosecutor to proceed with the prosecution, in order to insure its being carried to its legitimate conclusion. We repeat that we are no parties to the present proceeding, though it is not in our power to prevent it; and, therefore, all we say is that the rule for a criminal information is discharged.

Rule discharged.

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[18 Cox's Criminal Cases, 310.]

COURT OF QUEEN'S BENCH.

Saturday, Dec. 16, and Tuesday, Dec. 19, 1876.

(Before O'Brien, Fitzgerald and Barry, JJ.)

REG. (at the prosecution of BRIDGE) v. CASEY (').

Criminal information for libel—Attack on private character—Misconduct of prosecutor—Inciting to commission of crime—Reflections on character of defendant.

Where on an application to discharge a conditional order for a criminal information for libel, it appeared from the affidavits that the prosecutor was land agent over a large estate, and had raised rents and harshly treated the tenantry on the estate, and his conduct was criticised by the defendant in the alleged libels, which were published in a newspaper, and the prosecutor imputed bad motives and made accusations against the defendant in his affidavit, it was held that, although the court would refuse to grant the information had the libels merely been an imputation on the private character of the prosecutor, yet that as the alleged libels justified a previous attempt to assassinate the prosecutor, and pointed at his being eventually assassinated, the court would refuse to discharge the conditional order.

MOTION by the defendant John Sarsfield Casey to discharge on cause shown a conditional order for leave to file a criminal information against him, for two alleged libels published by him against the prosecutor, Mr. Patton Bridge, in the Cork Examiner, on the 13th of April, and in the Freeman's Journal, of the 27th of April, 1876. These letters were of great length, and were a criticism of the conduct of the prosecutor as land agent of Mr. Buckley, in managing his estate near Michelstown, in the county of Cork. These letters were published shortly after an attempt had been made on the life of Mr. Bridge, in which the driver of his car had been shot, and while a person named Crowe, *who was afterwards convicted of, and executed for [31] this murder was in jail awaiting his trial. The letters, which were of a similar nature, were in the form of letters

(¹) Reported by CECIL R. ROCHE, Esq., Barrister-at-Law.

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to the editors of the newspapers mentioned, the following are the most important passages :

"As many readers of the Freeman are ignorant of the nature of the demands made by Mr. Bridge on the tenants, and as this matter is just now attracting the attention of all English speaking people, I trust I may be excused, if in the interests of justice I ask space for a communication." The writer then proceeds to describe the nature of the property, which was a mountainous district reclaimed in great part by the exertions of the tenants. "Yet this is the town land which Mr. Bridge considers let so unmeasurably below its value that the increase he demands is only from 50 to 500 per cent." The writer then mentions the fact of Mr. Massy, an agent of the estate under a former landlord leaving the estate, and the high character he gave on leaving to the tenantry. "This is the disinterested testimony of a gentleman, at a time when the Irish people were plunged in the direst misery and distress, caused by the famine. Three years after, Mr. Bridge, accompanied by a Mr. Walker, 'walked' the lands, the result being that the rents were raised from 50 to upwards of 500 per cent. The rents of some poor creatures for a miserable cabin in a mountain ravine, which was but one shilling, was raised to 25s., and in some instances to 30s. per annum; and I doubt if these poor people ever possessed together half-a-crown. When tenants expected a decrease, the rents were trebled, many tenants, terrified at the idea of eviction, agreed to pay the increased rent; but shrewd men consider that they cannot pay that and live." "Similar cases of hardship might be given. In all about fifty-three notices to quit have been served. That Mr. Bridge is determined to eject these families may be gathered from the fact that one of his first acts on being restored to health, was to order his bailiffs to demand possession of such as had not arranged with him. Holy Week was the time selected for such a demand. Even to all who submit leases will not be given, as Mr. Buckley reserves to himself the right of converting at any moment his whole property into one vast preserve. He will stand another shot, or evict the fifty-three tenants." It appeared that the rents had been greatly raised as alleged. In his affidavit the prosecutor attacked the defendant, whom he accused of having been convicted of Fenianism, and imputed to him as a motive for these publications that he wished to increase the custom at his father's public-house by obtaining popularity by his attack on Mr. Bridge.

Butt, Q.C. (with him *W. O'Brien*, Q.C., and *John Roche*), for the defendant, moved to discharge the conditional order.

Armstrong, Sergt. (with him *Heron*, Q.C., and *Peter O'Brien*), for the prosecutor, *contra*.

BARRY, J.: This case is one of very considerable peculiarity, and in its circumstances and the combination of elements which it presents for our consideration differs [312] from any case of the kind within my experience. It is superfluous to observe that the proceeding by criminal information is a summary extraordinary remedy, the essential characteristic of which is that it puts the criminal law in motion against a person accused of a misdemeanor without the intervention of a grand jury, and the power of granting and enforcing which has been, from the earliest times, vested, and vested exclusively, in the Court of Queen's Bench. The Attorney-General can file the information by virtue of his office and on his own responsibility, and up to the passing of the English statute 4 & 5 Will. & M. c. 18, informations were filed by the clerk of the Crown without the express order of the court given in open court. The ground upon which and the cases in which leave to file the information is to be given are left wholly in the discretion of the court. "The Legislature," said Lord Kenyon, "left it to our discretion, trusting that we should not so far transgress our duty as to go beyond the rules of sound discretion." The class of alleged offences in respect of which leave to file the information will be given, is described in the books as gross and serious misdemeanors, in which category I shall venture to place cases where the prompt and authoritative interference of this court is required for the repression or prevention of disorder or crime, the maintenance of law and order, or the protection of property or life. When it is said that the granting of leave to file the information is entirely in the discretion of the court, the proposition is to be taken with this qualification, that the court has adopted certain rules by which in general the exercise of its discretion will be regulated, as, for example, "The prosecutor must appear entirely blameless in the transaction." "The prosecutor must not in his affidavit unnecessarily reflect upon defendant." But as to the application of these rules to the present case, I shall say more hereafter. The alleged libels are two letters published by the defendant, and the libellous imputation is that Mr. Bridge had acted harshly and oppressively towards certain tenants on the estate of a Mr. Buckley, over which the prosecutor is the land agent. On the part of the defendant it was contended that these

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letters are only fair comments upon the acts of the prosecutor in regard of the tenants in question. The late lamented Chief Justice Whiteside expressed a very strong opinion that the management of the estate of a private individual was not such a matter of public concern as to justify the discussion of it in the public press, so as to bring such discussion within the defence of fair comment. But it is not necessary to consider that point now, as it was not contended that in the events which took place in reference to this estate, the relations of Mr. Bridge with the tenants, and his conduct towards them, was not a legitimate topic for public discussion. It was, however, contended that this question of fair comment could not at all be entertained by this court, 313] but *that such issue, if it arises, must without any exercise of discretion on our part be sent to be tried by a jury. I cannot accede to that proposition. I deem it not alone my privilege but my duty on an application for a criminal information, in a case of alleged libel, to consider the language and tenor of the writing, the occasion of and all the circumstances surrounding the publication, and if I arrive at the conclusion that the writings, though defamatory, come within the category of fair comment, I deny that I cannot on that ground refuse the criminal information. But the prosecutor further contends that the libels are not fair comment on his conduct towards his tenants, the facts out of which the whole controversy has arisen are, as I gather from the affidavits, in substance these. [Here his Lordship read the facts of the case already set forth.]

If this case only involved the consideration of the libels on the one hand, and the conduct of Mr. Bridge commented on by the libels on the other hand, I would not make this conditional order absolute, but leave Mr. Bridge to proceed by indictment or permit him to bring his action. I do not pronounce these letters to be fair comments upon Mr. Bridge's acts. I do not say they are not exaggerated, and, upon important matters, incapable of justification. But the well known general rule of this court is that a prosecutor in a case of this kind must appear entirely blameless, he must not appear by his conduct to have afforded in any material degree excuse or justification for the publication complained of; and, applying that rule here, I would, if the case rested on this point alone, leave Mr. Bridge to his ordinary remedy. I do not pronounce any definite opinion on his conduct; but if we had only to deal on the one side with the mode in which this vast increase of rent was forced upon the tenants and, on the

other side, with the comments of the defendants, I would, on the evidence before us, refuse to make absolute this conditional order. If this were an ordinary case there are other grounds upon which I should be disposed to refuse the application. One of the general rules guiding the discretion of the court is that the prosecutor must be perfectly candid in all his statement of facts. Now, the statement in the libel being that he had raised the rents of the tenants alluded to from 50 to 500 per cent., the prosecutor says the increase was only 20 per cent. on the whole estate. The defendant, in his affidavit, challenges the statement as uncandid, because he says some of the holdings on the estate were under lease and the rents could not be raised. This is probably the result of an obscurity in the frame of the prosecutor's affidavit, but the objection is well founded as the affidavits stand. Again, it is a rule that the prosecutor must not unnecessarily reflect upon the character of the defendant or attempt to raise a prejudice against him. In this case the prosecutor in his affidavit states that the defendant was convicted of Fenianism and sentenced to five years' penal servitude. I am convinced that the statement was introduced with the contemptible, and I need not say *abortive, object of creating a prejudice against the [314] defendant. Another charge brought by the prosecutor against the defendant is that in writing these letters he was actuated by the belief that he would extend the business and custom of his father's public-house. I confess if this were an ordinary case I would find it very difficult, in the face of that wanton and in my mind wholly unfounded charge, to grant leave to file the information. But it seems to me there are elements in this case which take it out of the ordinary category of cases in which a criminal information is applied for as a remedy for a mere personal libel, where vilification of character is the sole scope and result of the publication complained of, and that these elements must prevent our applying to this case those technical rules to which I have adverted and which in ordinary cases would regulate the exercise of our discretion. Mr. Bridge states in his affidavit that in March, 1876, he was fired at in the avenue of Galtee Castle and wounded by one of the tenants named Ryan. [His Lordship here read passages from the affidavit of Mr. Bridge, in which he described the two attempts made to assassinate him, in the latter of which his driver was shot dead.] The crime thus described was in respect of its reckless audacity and the ruthless determination which prompted it unparalleled in my experience.

Such being the character of that deed, and assuming that the defendant's own assertion is true, that these tenants had to choose between eviction and submission to a rent which they could not pay and live, who could say that the rage, the frenzy, which impelled to so daring and dreadful a deed was confined to one or two, and was not shared by many? I will not say that nobody was justified in discussing in the public press the appalling deed and the causes or supposed causes which led to it; but I do say that any person who, not being a journalist and having no direct personal interest in the matter, volunteered to undertake the part of public commentator on such an occasion should have performed the task with an elaborately studied moderation, with a scrupulous adherence to the strictest truth, and the most careful avoidance of any expression or suggestion calculated to further stimulate the furious passions which had been aroused. Did the defendant act so? I am bound to say he did not. His language was excited and inflammatory; many of the most material statements were unfounded or exaggerated, and even though not wilfully untrue, were made recklessly, and without due inquiry; and the whole tone and tenor of the letter were calculated to rouse still more the angry passions of the people, and stimulate them to further acts of violence and crime. It is impossible to read these letters without coming to the conclusion that they would be understood by these tenants as justifying the deed of the 30th of March as an attempt at justice and not crime, and might stimulate others raging under a sense of injury, real or fancied, to consummate the fell purpose which on that day failed of effect, and so take 315] final vengeance upon this man, who, as *these letters announced, had doomed them to expulsion from their mountain homes and to a workhouse pauper's grave. It was under these circumstances that the prosecutor came into this court, and asked for this criminal information, not as in ordinary cases for the vindication of his character, but as a protection for his life. It may be said, how could we protect his life? We certainly could not afford him physical protection—the armed constables of the Queen failed to do that; but we could give him the protection he asked, namely, that by the prompt interference of this court we might deter the defendant and others from persevering in such a course of writing. We can at least do that which has always been a reason for the summary interference of the court, viz., mark out such writing at such a time as deserving the highest animadversion. It would

indeed be strange, in my opinion, if a man were to come into this court and say, "Here is a writing which incites men to murder me, I ask for your interference;" and the court were to answer, "Well, that is all very true, but you seem to have acted wrongly in the affair, or your attorney has introduced some passages in the affidavit reflecting on the writer, and therefore we cannot interfere." But again, when once the libel assumes the form of incitement to a serious breach of the peace—not to say murder—the matter becomes one in which the public are directly concerned. Of course in the repression of all libellous writing the public are interested, but that is only in a general way; but in the prevention or repression of writings inciting to crimes of violence the public are particularly and directly interested, and if the circumstances be such as to give a private individual a *locus standi* to bring a case of inciting to such crimes before the court I think there is no principle and no authority to prevent this court from interfering, irrespectively altogether of the merits in conduct, or procedure of the individual applicant. It is said that one of the cases where the criminal informations will be granted, is when the prompt and active interference of this court is required. I think this is such a case. I think the maintenance of law and order, the exigencies of the protection of life and property, demanded that this conditional order should have been granted. There is another element, which if not in itself sufficient to induce us to grant, should largely influence us in granting the information. One of the men who attempted the life of Mr. Bridge, on the 30th of March, was arrested, taken in the fact. There were many experienced persons who apprehended that, from the fact of fear or other causes, no jury could be got to do their duty, no matter how clear the case was proved against the prisoner. I do not advert to the fact that Mr. Bridge had his claim for compensation under the statute pending for the assizes. It is impossible to contend that these letters, published at such a time and under such circumstances, were not calculated to obstruct and prevent the due administration of justice. I do not mean to say that viewing these libels *only as publications calculated to weaken or impede [316 the course of the criminal law, in which the prosecutor had no interest otherwise than as one of the public, we would grant the information on his application. It would, in such a case, be for consideration whether the matter should not be left in the hands of the Attorney-General. But here the prosecutor has a direct interest in the vindication of the

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law: impunity for the man caught red handed in the attempt at the murder might well under the circumstances tend to renewed attempts on the prosecutor's life. Without, therefore, saying that this aspect of the libels would in itself constitute a ground for granting the order, I think it an element which should much influence our decision. It is, in fine, a case in which what may be termed the public consideration regarding the letters are so interwoven with the aspect of the publications when treated as merely private libels, that the prosecutor is entitled to rely on these public considerations, and to call for the interference of this court. The proposition that in cases where the misdemeanor complained of has a direct interest for the public, these technical rules as to the conduct or procedure of the prosecution do not apply, is not without authority. I refer to the case of *Reg. v. Norris* (2 Lord Kenyon, 300). That I think is a sufficient authority, but I do not require any authority, and am prepared to lay down the proposition on my own view of the principles which should guide this court. The counsel for the defendant referred to the fact that no new attempt has been made on Mr. Bridge's life, and that justice has been vindicated by the conviction of Crowe. But we must regard the case as it stood when the conditional order was granted, and perhaps the more especially as this is not a motion on the part of the prosecutor to make absolute, but on the part of the defendant to discharge that conditional order. To sum up in a few words all that I have said, I think leave should be given to Mr. Bridge to file the information, not because the libels commented unfairly upon his conduct towards the tenants, but because in so commenting they were calculated—I do not say intended—to incite to the commission of his murder, and in his regard to prevent the vindication of the law and mar the administration of justice.

FITZGERALD, J.: I concur in the decision which has just been announced and generally in the reasons given for it, and I would not now add another word if it were not that the case presents considerations of importance to the public interests. The prosecutor asks for leave to file a criminal information against the defendant for publishing a malicious libel. If he complained of a wrong of a private nature, of imputations on his character, however grievous, which affected his reputation only—if his complaint related to matters between him and the defendant only in which the public interests were not involved—I should have no difficulty in giving full effect to the technical and practical rules

first established by Lord Mansfield, and laid *down in [317 *Reg. v. Robinson* (1 W. Bla. 542)], and which were in substance adopted in this country, and have since regulated the discretion of the court, in granting or withholding leave to file an information at the suit of a private prosecutor. My Brother Barry has gone so fully into the details of the case, that I forbear from commenting on them, and shall only now observe that if we had to deal with this question, as if it was in respect of a private inquiry alone, I should entirely concur in the opinion that the prosecutor did not stand before us in that unblemished position which would entitle him to the extraordinary interposition of the court, and that the rule should therefore be discharged.

O'BRIEN, J.: I concur with the views so clearly stated by my Brother Barry. If this case merely rested on the imputation of libel upon private character I would have no hesitation in discharging the order. But having regard to the atrocious crime committed shortly before the publication, and to the fact that the alleged perpetrator was at the time awaiting trial, I am of opinion that those publications (whether the charges of exacting excessive rents were well or ill-founded) cannot be too strongly condemned.

Butt, Q.C.: Have you said anything as to costs?

O'BRIEN, J.: We never do.

Motion refused.

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[18 Cox's Criminal Cases, 318.]

QUEEN'S BENCH.

Jan. 19, 20 and 21, 1876.

(Before Whiteside, C.J., O'Brien, Fitzgerald and Barry, JJ.)

WHITE (in Error) v. THE QUEEN (). [318.]

False pretences—Vagueness of indictment—Conspiracy to defraud such persons as should negotiate for a loan with N. W.

Where N. W. was indicted and convicted on an indictment charging that he and others did conspire by false pretences to defraud of large sums of money all such persons as should apply to or negotiate with them for a loan of money, the indictment so framed was held too vague and uncertain in its language to sustain a conviction, which was reversed on writ of error.

WRIT OF ERROR brought by Nicholas White, who was convicted before O'Brien, J., at the Cork Summer Assizes,

(*) Reported by CECIL R. ROOPE, Esq., Barrister-at-Law.

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1875, of conspiracy to defraud, on an indictment charging as follows :

"That Nicholas White, W. B., N. W., S. A., and other persons unknown, being evil disposed persons, and wickedly devising and intending to defraud and cheat divers of Her Majesty's subjects not then ascertained, to wit, all such liege subjects who should at any time after the conspiracy, hereinafter mentioned, apply for and negotiate for a loan of money from them, on the 1st of January, 1873, did amongst themselves conspire, combine, confederate, and agree, by divers false pretences, and subtile means and devices, to cheat and defraud of sundry large sums of money divers of Her Majesty's subjects not then ascertained, to wit, all such of Her Majesty's liege subjects as should or might at any time afterwards apply to or negotiate with the persons so conspiring for a loan or loans of money."

And alleging the overt acts as follows :

"That the said Nicholas White, W. B., N. W., S. A., and the others so conspiring as alleged, afterwards, to wit, on 10th February, 1873, did, with intent to cheat and defraud, procure and cause to be inserted in divers newspapers, and amongst others in a certain newspaper called the *Cork Examiner*, circulating in the county of Cork, a certain advertisement, offering loans of money of £50 and upwards on personal security at 5 per cent., to such persons as should apply to Messrs. Bevan and Co., 10 Lincoln's Inn Fields, London, W. C. That the said Nicholas White, W. B., N. W., S. A., and the others so conspiring with them, in further pursuance of the said conspiracy, on the 1st of December, 1874, did, with intent to cheat and defraud, cause and procure certain letters to be received by one Patrick Murphy, at his residence, in the said county of Cork, offering and 319] agreeing to make him a certain loan at 5 per cent. per annum on certain conditions therein mentioned, and did thereby, with intent to cheat and defraud him the said Patrick Murphy, cause and procure the said P. M. to pay a certain sum of money, to wit, the sum of £5 17s. 4d. to a certain company, called the Manchester Provident Assurance Society (Limited), as, and for the premium on a policy of insurance on the life of him the said P. M., and to pay the sum of £4 3s. 6d. to William Bevan and Co., as, and for the charges and expenses of the said loan."

The indictment set out many other overt acts of the same nature, whereby persons were induced to pay money to insurance societies, and to William Bevan and Co., in pursuance of the alleged conspiracy.

The error assigned on the part of the prisoner relied on the following grounds :

“(1.) That the pretences, means and devices, in the indictment are not therein specifically set forth ; (2.) That the persons alleged to have been defrauded by the conspiracy are not described with sufficient certainty in the indictment, and no excuse averred for not describing them with greater certainty than therein appears ; (3.) That it is not stated in the indictment to whom the moneys alleged to have been acquired by means of the said conspiracy belonged ; (4.) That the said Nicholas White does not appear to have been convicted for any offence known to the law ; (5.) That the conspiracy charged in the indictment is not described with such sufficient certainty, nor does such indictment contain any proper averment to show, that an offence was committed against the law of the land, or that the defendant is bound to answer the said indictment.”

Peter O'Brien (with him *Butt*, Q.C.), for the plaintiff : All the ingredients of the offence with which the prisoner is charged, the facts, circumstances, and intent constituting it, must be set forth with certainty and precision, without any repugnancy and inconsistency, and the prisoner must be charged directly and positively with having committed it (*Archbold*, 18th edit., p. 38 ; *R. v. Horne*, Cowp. 675). An indictment charging that the defendants unlawfully conspired to defraud divers persons, who should bargain with them for the sale of merchandise, of great quantities of such merchandise without paying for the same, with intent to obtain to themselves money and other profit, was held bad for not showing by what means the parties were to be defrauded (*R. v. Peck*, 9 A. & E. 686). See also as to indictments of this nature *R. v. Perrott* (2 M. & S. 379) ; *R. v. Mason* (2 T. R. 581) ; *R. v. Richardson* (1 M. & R. 402) ; *R. v. Fowle* (2 C. & P. 592) ; *R. v. King* (7 Q. B. 782). The persons to whom the money intended to be acquired belonged are not named, this is a necessary averment (*R. v. Martin*, 8 A. & E. 481 ; *R. v. Parker*, 3 Q. B. 292).

R. L. Dames (with him the *Attorney-General*), for the Crown, cited *R. v. Gill* (2 B. & Al. 204) ; *R. v. Kenrick* (5 Q. B. 61) ; *R. v. Gompertz* (9 Q. B. 824) ; *Sydserrff v. The Queen* (11 Q. B. 245) ; *R. v. De Berenger* (3 M. & S. 67) ; *Heymann v. The Queen* (L. Rep. 8 Q. B. 102) ; *R. v. Goldsmith* (L. Rep. 2 C. C. R. 74).

The *Attorney-General* claimed the right of reply, but yielded the point, the court expressing no opinion on the right of the Crown to reply in error.

Butt, Q.C., for the prisoner, in reply.

Cur. adv. vult.

320] *WHITESIDE, C.J.: In considering this case it is necessary to consider the exact charge which the indictment in substance contains. I have before me a lucid abstract of the indictment drawn up by my Brother Fitzgerald, it is as follows: "That the said Nicholas White and others did conspire, by false pretences, to defraud of large sums of money all such persons as should apply to or negotiate with them for a loan of money." I wish to point out what the offence charged would be if the charge of conspiracy were left out of the indictment—the offence would be "the having induced persons to apply for loans of money." Although the indictment may be good, it must be confessed to be unique; the mere averment of the overt acts did not make it good. There has been a conviction on this indictment, sentence has been passed, the prisoner is now suffering the penalty, error has been brought, and these are the points relied on. [The Chief Justice read the points.] Now we have before us the objection to the judgment and the writ of error; and the question is, whether or not the prisoner can be held to have been rightly convicted on that indictment? Touching the certainty required in an indictment, it is well explained in Cowper's Reports, 683, in *R. v. Horne*. "The charge must contain such a description of the crime that the defendant may know what crime it is he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the court may see such a definite crime that they may apply the punishment which the law prescribes." Again: "Whatever circumstances are necessary to constitute the crime must be set out; this applies especially where the circumstances go to constitute the crime." No indistinct indictment can be good. In 1 Chitty Criminal Law, 230, it is laid down: "An indictment against a man, charging him with being a common conspirator, or any such indistinct accusation, would be bad." The rule was well exemplified by the essential requisites in the indictment for obtaining money by false pretences, p. 230. The case of *R. v. Mason* (2 T. R., 581), ruled that an indictment for obtaining money by false pretences was insufficient if it did not show what the false pretences were. The reason is well explained by Lord Ellenborough: "The falsification should be applied to the particular thing to be falsified; the convenience of mankind demands and in furtherance of

that convenience it is part of the duty of those who administer justice to require, that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached as false." In the history of this offence Mr. Greaves laments (Criminal Acts, 177), that he could not get inserted in 14 & 15 Vict. c. 100, s. 8, a clause dispensing with an averment [321 of the ownership of the property obtained by false pretences. Therefore, it was decided, in *Reg. v. Gill* (2 B. & Al., 204), that an indictment for obtaining goods by false pretences is bad in error if it does not state to whom the goods belonged. This is not cured by sect. 8 of 14 & 15 Vict. c. 100. Crompton, J., says: "Before the statute it was necessary to state both the particular person to whom the property belonged, and the particular person whom it was intended to defraud." The same principle is laid down in error in *Reg. v. Masters* (8 A. & E., 481), viz., that the indictment must state to whom the goods belonged. Therefore it seems that clause 85 of 24 & 25 Vict. c. 96, was passed, enacting that the indictment for obtaining money by false pretences would be good without alleging any ownership of the money or chattel. Now the 14 & 15 Vict. c. 100, would, if it applied, enable the prosecutor in this case to amend a variance in the name or description of any matter named or described therein, or in the ownership of any property named therein; but this does not touch a case where a necessary averment is wholly omitted, and moreover must be acted on before verdict. If, therefore, this latter act does not touch the case, and the same necessity existed to aver the ownership of the property obtained by fraud in an indictment for conspiracy, as in an indictment for obtaining money by false pretences, the omission of such an averment would seem to be fatal. I must say that if I never had read one of these modern cases, but if we had only two or three of the old books, and I were asked my opinion, I should be obliged to say I did not understand this indictment, and I should have said it was an indictment that left the prisoner in doubt as to the person to be defrauded and as to the legal offence charged. If we left out the charge of conspiracy, it would be hard to find the exact specific offence charged and the old books say indistinctness is not to be overlooked. The Attorney-General said the offence was in the conspiracy. Now is everything a conspiracy? Suppose three men met and agreed to purchase

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three boxes of American apples, that would not be a conspiracy. I think the better way would be to notice the cases in the order in which they were presented, with a view of understanding the indictment. The Attorney-General defined the nature of the case as a conspiracy, and he argued that when the persons defrauded were unascertained, but were to be found out afterwards, they need not, as they could not, be named in the indictment. But I think there was a fallacy in his argument. When are the persons to be ascertained? If they were ascertained at the time of sending up the indictment, and if they were not then sent up, the case falls within the authority of *Reg. v. De Berenger*. I think the case of *Reg. v. Gill* (2 B. & Al., 204) deserves the first notice. The indictment there was general enough, but still it is intelligible and specific. There the indictment 322] charged that the defendants conspired *by divers false pretences, and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof. There is no comparison whatever between the precision of that indictment and this—there are there two persons named. Abbott, C.J., says: "It is objected that the particular means and devices are not stated. It is, however, possible to conceive that persons might meet together and might determine and resolve that they would, by some trick and device, cheat and defraud another without having at that time fixed and settled what the particular means and devices should be. Such a meeting and resolution would nevertheless constitute an offence. If, therefore, a case may be reasonably suggested in which the matters here charged would, if there were nothing more, be an offence against the law, it is impossible, as it seems to me, to conclude that the law would require the particular means to be set forth." Bayley, J., says: "It is, therefore, not necessary to state the means at all in the indictment, it being quite sufficient to charge the defendants with the illegal conspiracy, which is of itself an indictable offence." Holroyd, J., says: "The present case differs materially from the case of obtaining money under false pretences. Then the false pretences constitute the offence, but here the conspiracy is the offence, and it is quite sufficient to state only the act of conspiring and the object of the conspiracy in the indictment. Here it is stated that the parties did conspire, and that the object was to obtain by false pretences money from a particular person. Now, a conspiracy to do that would be indictable, even when the parties had not settled the means to be employed." I think

the fallacy which existed in the present case on the part of the Crown arose from the fact that it did not appear on the face of indictment that this was necessarily an illegal conspiracy. I do not know that the acts charged in this case would be indictable. I will now refer to some cases as to what constitutes uncertainty in an indictment. *Reg. v. Richardson* (1 M. & Rob., 402), was a case at *nisi prius*, but the lawyers asked the Lord Chief Justice to decide the case himself to save expense. There it was held that an indictment for a conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained is too general. The indictment was very general, but still it states that the prosecutor got a verdict and that these persons defrauded him of it. Lord Denman says: "As this case has been fully argued, and it seems to be the wish of both parties that I should decide on the validity of this indictment here, I will give my opinion on it now, and that opinion is that the indictment is bad in point of law, the allegation is too general and does not convey any specific idea which the mind can lay hold of to judge whether any unlawful act has been done or attempted. The terms used do not import in what manner the prosecutor was to be deprived of the fruits and advantages of his verdict, and it is not even alleged that the verdict would lead to any fruits and advantages. It is essential that the parties should conspire to do something which the law may *contemplate as an illegal [323 act." That is something more than a mere *nisi prius* case; but there is another *nisi prius* case which I cite for the judgment of Lord Tenterden: *R. v. Fowle* (4 Car. & P., 492). There, the second count charged that the defendants did confederate, combine, and conspire to cheat and defraud the just and lawful creditors of the defendant F. Lord Tenterden says: "This count appears to me to be much too general. It does not state what was intended to be done or the person to be defrauded. I should be very sorry to give effect to so general a count as this. However, I will not stop the case upon this point, for if I were to direct an acquittal and this point should turn out to be good, the defendants might plead *autrefois acquit*." That is a most important decision, coming as it does from such an eminent person. The case of *Reg. v. King* (7 Q. B., 782), is the next to be considered. It was decided by the same court that decided *Reg. v. Parker*, and I cannot but think it is a very valuable case, more even for the principles laid down than for the precise decision. Williams, J., says, at page 794: "I think the case differs from *R. v. Parker*, where the

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indictment was for conspiring to defraud persons of goods, but did not state whose the goods were." He does not question that decision, but he distinguished the case then before him from it. The case was argued with great precision in the Exchequer Chamber. What is said of *Reg. v. Berenger*? Alderson, B., says at page 798: "They were a class. The individual might become known afterwards." The argument was that the persons defrauded were an unascertained class; but the indictment itself shows that they were known then, but that is not so in this case. The counsel argued, if there is a conspiracy to injure given persons who are unknown to the jurors, it should be stated accordingly. In giving judgment, at page 807, Tindal, C.J., observed: "The more important objection was that the indictment itself was bad, and we are all upon consideration of opinion that this objection must prevail. Mr. Pashley, for the plaintiffs in error, argued that the indictment was bad because it contains a defective statement of the charge of conspiracy, and we agree that it is defective. The charge is that the defendants below conspired to cheat and defraud divers liege subjects being tradesmen of their goods, &c., and the objection is that these persons should have been designated by their Christian names and surnames, or an excuse given, such as that their names are to the jury unknown, because this allegation imports that the intention of the conspirators was to cheat certain definite individuals, who must always be described by name, or a reason given why they are not; and if the conspiracy was to cheat indefinite individuals, as for instance those whom they should afterwards deal with, or afterwards fix upon, it ought to have been described in appropriate terms, showing that the objects of the conspiracy were at the time of making it unascertained, as was in fact done in the cases of *R. v. De Berenger* and 324] *R. v. Peck*." The whole of *that case is valuable, as overruling the Queen's Bench, who held that the conspiracy was stated with sufficient distinctness. I now cite *Reg. v. Parker* (3 Q. B., 292). Patterson, J., says: "As to the words 'to cheat and defraud,' Mr. Platt attributes too much force to them. His argument, if good, would show that the subject-matter of conspiracy need not be stated at all." Williams, J., says: "I believe *Reg. v. Gill* (2 B. & A., 204) is generally mentioned as the case of the greatest laxity, though I think that still earlier a count was framed in a very general form, and added to others for the sake of greater security. But in all cases, if goods were in question, they were laid as being the goods of certain persons."

That was the opinion of a great judge, and the verdict was reversed on error. It may be said, is it possible that I am about to cite more cases? But I was much interested in this case and argument; and where a man is in jail it is incumbent on us to look into as many cases as we can. There is one of these cases that the counsel for the Crown referred to (*Reg. v. Peck*, 9 A. & E., 686). There a count for conspiring to deceive and defraud divers of Her Majesty's subjects who should bargain with defendants for the sale of goods, of great quantities of such goods without making payment or remuneration or satisfaction for the same, with intent to obtain profit and emolument to defendants (not stating what the defendants conspired to do) is bad, as not showing the conspiracy was for a purpose necessarily criminal. Why, the goods must belong to another, and if it is so, it must be so stated in the indictment; a man cannot steal his own goods.

Then, upon the point pressed here by the Attorney-General, that you can find out the persons afterwards, Lord Denman, C.J., says: "If the offence went no further than the general conspiracy, it could not be known what particular persons would fall into the snare. But we think that the count is defective in not stating with sufficient particularity what the defendants conspired to do." The case of *Reg. v. Kenrick* (5 Q. B. 49) is a curious case, considering *Reg. v. Parker*. Lord Denman, C.J., says at page 61: "This form of indictment was formally questioned in *Reg. v. Gill*, and was upon discussion held good, nor has that decision been overruled. The indictment in *Rex v. Eccles* (13 East, 230), stated in a note there, is equally good. There have not been wanting occasions when learned judges have expressed regret that a change so little calculated to inform a defendant of the facts intended to be proved against him should be considered by the law as well laid. All who have watched the proceedings of courts are aware that there is danger of injustice from calling for a defence against so vague an accusation, and judges of high authority have been desirous of restraining its generality within some reasonable bounds. The ancient form, however, has kept its place." And further on he observes at page 65, "We think that in this case the two ingredients of the offence of obtaining money under false pretences were proved by the evidence. The pretences were *false, and the money obtained by [325 their means." I do not say I admire that case, but I do not think it applies here. Now in the case of *Reg. v. Gompertz* (9 Q. B. 824), a count in an indictment was held good which

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simply charged that defendants unlawfully, &c., did conspire, combine, confederate, and agree together, by divers false pretences and indirect means, to cheat and defraud R. of his moneys. Lord Denman, C.J., said at page 838, "The authority of *Reg. v. Gill*, never overruled, but founded on excellent reason, and decided by Lord Tenterden and Holroyd, J., has been always recognized, though not without regret, because that form of the indictment may give too little information to the accused. A fair observation was made upon the manner in which that precedent was treated in *Reg. v. Biers* (1 A. & E. 327), but even from the expressions there used, and much more from what has been said in latter cases, it appears plainly that the court has never doubted the correctness of the decision in *Reg. v. Gill*." They concluded that it would be enough to make out false pretences, and from the fact of a person being mentioned they held the indictment good. I think—"to cheat A. B."—is an intelligible charge enough, you have given the defendant particulars, the idea is a specific one, and the offence is one which the law can interpret. There is a long note given by Mr. Greaves, at page 152 (3 Russ. Cr., 4th edit.), in which he endeavors to explain the cases, and if it is accurate it is an explanation: "Although there appears at first sight to be some little discrepancy in the cases upon this point, perhaps they are not irreconcilable. The correct distinction to be drawn from them appears to be this, that where there has been merely a conspiracy for a particular purpose (e. g., to raise the funds), and such conspiracy has not been carried into execution, an indictment in general terms will be sufficient; but where there has not only been a conspiracy, but such conspiracy has been carried into effect, there the indictment ought to specify precisely what has been effected, as, the parties injured, the property obtained, and to whom it belonged. The reason of such a distinction is that in the one case it is impracticable to state with minuteness what never was carried beyond the intention, whereas in the other case what was actually effected may easily be stated." Now, looking at this case as if it were a case at common law, and untouched by the statutes, it does seem to me to stand as described in *Heymann v. The Queen* (12 Cox C. C. 383). At first blush that case attracts the attention as being very favorable for the Crown, but when you look at it more closely, I am not so sure that this is so. The indictment was that the "defendant and others unlawfully and wickedly did conspire and agree together, contrary to the provisions of the Debtors

Act, 1869, and within four months next before the presentation of a bankruptcy petition against defendant, fraudulently to remove part of the property of defendant to the value of £10; that is to say (enumerating divers *arti- [326 cles), defendant then being a trader and liable to become a bankrupt." I think there is a great deal of information in that count, which Lord Denman says the other count did not contain; it names and describes the goods, and the time, and mentions that he was then a trader liable to become a bankrupt. It was held, that the fact of the defendant having been adjudged a bankrupt was not necessary to complete the offence of conspiracy, it was complete if the persons charged had agreed to remove the goods in contemplation of an adjudication being obtained; and that this, though not expressly alleged must be taken after verdict to have been proved before the jury, and that the indictment was therefore cured by verdict. Blackburn, J., says, "The objection to the count, therefore, is that it does not state that the agreement or confederacy was in contemplation or expectation of an adjudication; and if the question had arisen upon demurrer, I am not quite prepared to say that might not have been a good objection." And further on, "When an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not be found on this issue without proof of this averment, then after verdict the defective averment which might have been bad on demurrer is cured by the verdict." I do not think that case falls within that principle, for I do not think this is a defective averment, but it is an absolute omission of an important averment, for there is no averment that the goods taken were the property of the person from whom they were taken. It is one thing to cure an imperfect averment and another to supply an omission. We are all of opinion that judgment must be given against the Crown.

O'BRIEN, J., concurred that judgment should be against the Crown.

FITZGERALD, J.: The indictment on which the defendant has been convicted, omitting mere terms of art and superfluous language, reads thus: "That the said defendant and others, intending to cheat divers persons not then ascertained, did conspire by divers false pretences to defraud of sundry large sums of money divers persons not then ascertained, to wit, such persons as should apply to them for a loan or loans of money." Is that indictment sufficient after

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verdict? In my opinion it is not. It is so vague that it conveys no specific idea of the offence imputed to the defendant. It is not even alleged that the defendant and his supposed confederates were or professed to be engaged in any common pursuit, such as money lenders, bill discounters, bankers, or agents to procure loans of money; nor are any means stated or described by which the objects of the confederates were to be achieved, so as to give the defendant some information of the charge against him. It would seem to me to be very dangerous if a conviction could be sustained on an indictment so very general and so unspecific. 327] In *Re O'Connell* (11 C. & F. 234), Tindal, C.J., rests the objection to the count on this: "They do not state the illegal purpose and design with such proper and sufficient certainty as to lead to the necessary conclusion that there was an agreement to do an act in violation of the law," and in *Reg. v. Rowlands* (15 Q. B. 671), the 16th, 17th, and 19th counts were condemned as being too vague and general, though the conviction was sustained on the others, as to which Lord Campbell observes, "The words of the Legislature are used; the terms in question have a meaning stamped on them by the statute, and we must take it they are used here in that sense." The Attorney-General relied principally on *Reg. v. Eccles* (13 East, 230), *Reg. v. Gill* (2 B. & Ald. 204), and *Sydserrf v. Regina* (11 Q. B. 245), to sustain the indictment. *Reg. v. Gill* may be taken as the representative case of the class. The indictment there alleged the conspiracy very generally to have been "that the defendants did conspire by divers false pretences to obtain from P. D. and G. D. large sums of money and to cheat and defraud them thereof." The principal objection taken in arrest of judgment was that the means and devices were not stated, to which Abbott, C.J., answers, "That persons might meet and conspire by some trick or device to cheat another without having at the time fixed and settled what the particular means and devices should be; such a meeting and resolution would nevertheless constitute an offence;" and Bayley, J., observes, "When parties have once agreed to cheat a particular person of his money, though they may not have fixed on the particular means, the offence of conspiracy is complete." The indictment was held to be sufficient. That case was followed in *Sydserrf v. Regina*; and in *Reg. v. Gompertz* (9 Q. B. 838), Lord Denman says of it, "*Reg. v. Gill* has never been overruled, and is founded on excellent reason, and has been recognized, though not without regret, as it may give too little information to the accused." *Reg.*

v. Gill is therefore a weighty authority, but we are not bound in any way to extend it. Abbott, C.J., in that case says, "The nature of the offence must be laid with reasonable certainty so as to apprise the defendant of the charge." *Reg. v. Gill* goes to the utmost verge of the law, and the indictment before us, it will be observed, is still more general and in my opinion does not with reasonable certainty apprise the defendant of the charge against him. I may add, too, with Lord Mansfield, that "In a criminal charge there is no latitude of intendment to include more than is charged. The charge must be explicit enough to support itself." A practice has recently prevailed of shaping indictments in so very general a form as to cast the smallest burden of proof on the prosecutor;—that may be all right, but the prosecutor has in the present instance finessed too much. I have only to add that I do not in the least rest my judgment on *Reg. v. Martin* (8 A. & E. 481), so strenuously pressed by the defendants' counsel, which is applicable to an indictment under the statute for obtaining goods by false pretences; nor would I extend that decision to a case of *an indictment for a conspiracy to cheat where the [328 conspiracy is the gist of the charge.

BARRY, J.: I also think that our judgment should be for the prisoner. The indictment surpasses in vagueness and uncertainty any precedent to which we have been referred and, as I believe, any precedent that can be found in the books. I am not sure that, notwithstanding the statute, the count is not bad, according to *Reg. v. Parker*, for omitting to state to whom the moneys belonged; but I do not think it necessary to give any opinion on that point, as I rest my judgment not upon the omission of any particular averment or averments, but upon the general frame and structure of the indictment which, in my opinion, is too vague, undefined and uncertain in language to be the record of the charge upon which an accused person is to be put on trial.

Judgment for the plaintiff.

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[18 Cox's Criminal Cases, 345.]

COURT OF CRIMINAL APPEAL.

Saturday, Dec. 2, 1876.

(Before Cockburn, C.J., and Lord Coleridge, C.J., Cleasby and Pollock, BB., and Field, J.)

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*REG. V. LANGTON (').

Evidence—To refresh memory—Document not written by witness—Limited Joint Stock Company.

It was the prisoner's duty, as a time-keeper, to give to a clerk (not the pay clerk) a list of the number of days on which each workman had worked, and it was the clerk's duty to enter these times in the time book and the amount of wages due to each workman according to such returns; and from the time book at the time of paying the wages it was the prisoner's duty to read out aloud the number of days each man had worked, and the wages due, which were then paid to the workman by the pay clerk. The prisoner had wilfully falsified the list by overstating the time one of the workmen had worked, and the false statement was entered in the time book by the clerk, and wages calculated accordingly. On the pay day the entries were read out aloud by the prisoner and the amount of wages so represented paid to the workman. On an indictment against the prisoner for false pretences, the pay clerk was called as a witness, and not remembering the particulars of the entries, he was allowed to refresh his memory by reference to the time book, although the entries were not made by himself, because he saw the entries at the pay time when they were read out by the prisoner, and knew that the prisoner then read the entries correctly and that he, witness, had paid the sums mentioned in those entries:

Held, that the time book was properly admitted to refresh the witness's memory.

Parol evidence that a Joint Stock Company (Limited) has acted as an incorporated company is sufficient evidence of its incorporation as a limited company on an indictment for false pretences in which the property obtained is alleged to be the property of the A. B. Company (Limited).

346] *THE prisoner, Edward Langton, was tried at the adjourned Quarter Sessions of the Peace, held at Kirkdale, in the county of Lancaster, on the 11th of July last past, upon an indictment charging him in the first and second counts with obtaining by false pretences from Thomas Chitson certain money of the Tawd Vale Colliery Company, Limited, with intent to defraud; and in the third count with obtaining by false pretences from Samuel Higginbottom certain other money of the said company with intent to defraud.

The prisoner was in the service of the said company as one of their time-keepers, and it was his duty to give in to another clerk fortnightly a list of the number of days on which the workmen in the employ of the company had worked during the preceding fortnight. It was the duty of the clerk to enter in the time book these numbers and the amount of the wages due to each workman according to the number of days worked, and from this time book, at the

(¹) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

time of paying the workmen's wages, it was the prisoner's duty to read out aloud the number of days each man had worked, and the wages were then paid to the workman by the pay clerk accordingly.

Robert Aspinwall, a workman in the employ of the company, kept a provision shop on his own account, at which the prisoner dealt, and at the time when the prisoner made the false pretences charged in the indictment, he was indebted to the said Robert Aspinwall. The 14th of April last past was the day on which the wages earned during the fortnight preceding the 11th of April became payable. During that fortnight Aspinwall had worked twelve days and no more, and there was due to him in respect of his said work the sum of £2 11s. and no more, his wages being 4s. 3d. a day. At some time between the said 11th and 14th of April the prisoner asked Aspinwall how many days he had worked during the fortnight. Aspinwall told him, as the fact was, that he had worked twelve days. The prisoner then asked Aspinwall how much money he, the prisoner, owed Aspinwall in respect of provisions bought of him by the prisoner, and on Aspinwall telling him the amount, the prisoner said, "I will put it down to your time."

There was no evidence of the time list handed in by the prisoner in respect of that fortnight; but the time book was made up apparently according to the same course, and in the time book the number of fifteen days and a half day was entered as the time which Aspinwall had worked during that fortnight, and the sum of £3 5s. 10d., being at the rate of 4s. 3d. per day for fifteen days and a half day, was entered as the amount of the wages due to him. These entries the prisoner read out aloud at the pay time on the said 14th of April, and the pay clerk, the said Thomas Chitson, then handed to Aspinwall, in the presence of the prisoner, the sum of £3 5s. 10d. accordingly.

The 12th day of the following month of May was the day on which the wages earned during the fortnight preceding the 9th of May became payable. During that fortnight Aspinwall had *worked twelve days and no more, [347 and there was due to him in respect of such work, at the same rate of 4s. 3d. a day, the sum of £2 11s., and no more. On the said 9th of May the prisoner asked Aspinwall what time he had worked during that fortnight and how much he, the prisoner, owed Aspinwall. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and that the prisoner owed Aspinwall the sum

of 18s. 6d., which he had paid for the prisoner at his request. The prisoner then said that he would put the said sum of 18s. 6d. to Aspinwall's time.

At the pay time on the said 12th of May, the number of days' work entered in the time book to the credit of Aspinwall was sixteen days and a half day, and the sum of £3 10s. 1d. was entered as the amount due to him in respect of such work. These entries the prisoner read out aloud at the said pay time, and the said pay clerk then handed to Aspinwall the sum of £3 10s. 1d. accordingly.

The 9th day of the following month of June was the day on which the wages earned during the fortnight preceding the 6th of June became payable. During that fortnight Aspinwall had worked twelve days, and no more, and there was due to him in respect of such work, at the same rate of 4s. 3d. a day, the sum of £2 11s., and no more. On the said 6th of June the prisoner asked Aspinwall what time he had worked during that fortnight, and what the prisoner owed Aspinwall for provisions. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and the amount which the prisoner owed Aspinwall for provisions, upon which the prisoner said to Aspinwall that he, the prisoner, would put down to Aspinwall's time the amount so owing by the prisoner to Aspinwall.

On the said 6th and 9th of June, Samuel Higginbottom, the secretary of the said company, was acting as and for the pay clerk, and made up the time book for the wages which became payable on the said 9th of June, and the prisoner gave in the number of fourteen days and three-quarters of a day as the time which Aspinwall had worked during the said fortnight. The time book was then made up by Higginbottom according to the usual practice, and on the said 9th of June the prisoner, at the pay time read out from the said time book fourteen days and three-quarters of a day as Aspinwall's time, and £3 2s. 8d. as the sum owing to Aspinwall in respect of work.

As to all the charges against the prisoner, Aspinwall proved the sums of money he had received on the said pay days and the number of the days for which he had been so paid wages, but in respect of the charges mentioned in the first and second counts Thomas Chitson, the pay clerk, was called as a witness before Aspinwall gave his evidence.

The prisoner's counsel objected to Chitson being allowed to refer to the time book to enable him to say for how many days' work and what amounts of money he had paid Aspin-

wall on the *said 14th of April and 12th of May. The [348 counsel contended that as Chitson had not made the entries in the time book he ought not to be allowed to refer to it to refresh his memory ; but as Chitson proved that he had seen those entries whilst the prisoner was reading out aloud at the pay time, and that though at the time of the trial he did not remember the particulars of the entries without referring to the book, yet he knew that at the pay time the prisoner read the entries correctly, and he, Chitson, had paid the sums which were mentioned in those entries. I allowed his evidence to go to the jury, reserving the point for the opinion of this court.

As to all the counts the prisoner's counsel contended that it was necessary in support of the indictment to prove that the Tawd Vale Colliery Company (Limited) was an incorporated company ; that this could not be proved by parol evidence only, and that as there was only the parol evidence of witnesses, who swore that the company was incorporated, I ought to direct an acquittal of the prisoner.

To this the counsel for the prosecution replied that as by virtue of sect. 88 of statute 24 & 25 Vict. c. 96, the indictment would be sufficient without alleging any ownership of the money, the references to the company might have been omitted without vitiating the indictment, and the allegations as to the company might, therefore, be rejected as surplusage.

I declined to direct an acquittal, and left the evidence to the jury accordingly, but I reserved a case on this point also for the opinion of this court.

The jury found the prisoner guilty.

The court sentenced him to twelve months' imprisonment with hard labor, subject to the opinion of this court as to whether I was right in overruling the objection raised on behalf of the prisoner by the counsel.

EDWARD GIBBON, Chairman.

No counsel appeared on either side.

COCKBURN, C.J. : As to the first point, whether under the circumstances the time book could be looked at by the pay clerk to refresh his memory, it appears to me that it could. It would be very dangerous to allow such a course where the entry has only been seen by the witness in the absence of the prisoner, but in this case the witness had actually seen the entry at the time it was read out aloud by the prisoner and knew that the prisoner had read it correctly, and that he had paid the wages according to the entry. The witness was, therefore, properly allowed to refresh his mem-

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ory from the time book. As to the second point, it was not necessary to prove strictly that the company was a limited company under the Joint Stock Companies' Act. Evidence that company had acted as such was sufficient.

LORD COLERIDGE, C.J., CLEASBY, B., POLLOCK, B., and FIELD, J., concurred.

Conviction affirmed.

A witness may assist his memory by any writing, although not made by himself, provided he can speak from his recollection after inspection of the writing: *Sturm v. Atlantic*, etc., 38 N. Y. Superior Ct. Rep., 284; *Marclay v. Shultz*, 29 N. Y., 348; *Kendall v. Stone*, 2 Sandf. Supr. Ct., 269; *Feeter v. Heath*, 11 Wend., 477, 485; *Holladay v. Marsh*, 3 Wend., 142; *Lawrence v. Barker*, 5 Wend., 301; *Johnson v. Coles*, 21 Minn., 108; *Chicago*, etc., v. *Liddell*, 69 Ills., 639.

When the witness has no independent recollection of the facts about which he is questioned, after reference to the entries in a book, although he may recollect that the contents were correct at the time he saw them, the writing itself must be produced that the other party may cross-examine respecting it: *Adac v. Zangs*, 41 Iowa, 536.

It is the right of a party to inspect a memorandum used by a witness while testifying; whether he reads the contents or only uses it to refresh his recollection. A witness, on cross-examination, may be compelled by the referee to produce and submit to the inspection of counsel a memorandum from which he has been testifying, on the direct examination. Before a witness can be required to produce a paper, however, it must appear that he is using it as, or in aid of, his testimony: *Tibbetts v. Sternberg*, 66 Barb., 201; *Peck v. Lake*, 3 Lans., 136.

A paper, signed with a mark of a witness who cannot read or write, when produced at a trial as a memorandum to refresh his recollection, is not to be read to him in the presence of the jury; but the witness is to withdraw with one of the counsel on each side, and have it read to him by them, without comment: *Com. v. Fox*, 7 Gray, 585.

A witness who does not recollect the

facts relative to a transaction independent of a memorandum may refer to it to refresh his memory. It must however, appear that there is a necessity for its introduction on account of the inability of the witness to recollect the facts, after refreshing his memory by the writing: *Russell v. Hudson River*, etc., 17 N. Y., 134; *Philbrin v. Patrick*, 3 Abb. Ct. App., 605, 6 Abb., N.S., 284; *Wheeler v. Ruckman*, 2 Abb., N.S., 189; *Taylor v. Stringer*, 1 Hilton, 377; *Kennedy v. Crandell*, 3 Lans., 1, 5; *Driggs v. Smith*, 36 N. Y. Superior Court Rep., 283, 48 How. Pr., 447; *Clarke v. Smith*, 46 Barb., 30; *Wilde v. Hexter*, 50 Barb., 449; *Sackett v. Spencer*, 29 Barb., 180; *Frazer v. Frazer*, 14 U. C. Com. Pl., 70.

If the witness knew a memorandum, when it was made, to be correct, and cannot, after referring to it, state the facts from memory, the memorandum itself may be read to the jury: *Bank v. Culver*, 2 Hill, 531; *Guy v. Mead*, 22 N. Y., 466; *Lewis v. Ingersoll*, 3 Abb. Ct. App. Dec., 55, 58, 1 Keyes, 347, 358; *Bank v. Culver*, 2 Hill, 531; *Taylor v. Stringer*, 1 Hilton, 377; *Vandynne v. Thayer*, 19 Wend., 162; *Yale v. Comstock*, 112 Mass., 267; *Walt v. Sawyer*, 55 N. H., 38.

Lawrence v. Barker, 5 Wend., 301, and *Butler v. Benson*, 1 Barb., 527, are not now good law on this point.

Minutes of the testimony of a living witness, taken by counsel upon a former trial, who produces them and swears that he has no doubt of their correctness, but has no recollection independent of the minutes, may be read by him, and are evidence to the jury: *Halsey v. Sinsebaugh*, 15 N. Y., 485; *Martin v. Cope*, 3 Abb. Court App. Dec., 182; *Gannon v. Stevens*, 13 Kans., 449.

A witness may testify to what a witness testified to on a former trial

though he kept no minutes of his testimony: *State v. Archer*, 54 N. H., 465; *Kean v. Com.*, 10 Bush (Ky.), 190.

The minutes of a former trial kept by an attorney, since deceased, are not competent evidence, although accompanied by proof that such attorney kept minutes during the whole trial; and that the minutes offered, according to the recollection of a witness present, appear to be of the whole trial: *Crouch v. Parker*, 56 N. Y., 597.

So the statements of witnesses upon another trial, as contained in the bill of exceptions, are not evidence in a different suit without the consent of the parties: *O'Neill v. Calhoun*, 67 Ills., 220.

Otherwise, it seems, in Kentucky, from a bill of exceptions on a former trial of a *civil case*, when a retrial has been ordered: *Kean v. Com.*, 10 Bush (Ky.), 190.

A memorandum by a witness is not competent to prove any inference by the witness as to his custom, or fact resulting from inference of which he has no recollection: *Taylor v. Stringer*, 1 Hilton, 377.

When a party testifies that he made certain entries in his book in accordance with statements made to him by others, and such others testify that the facts were correctly given to him, and that he entered them, such evidence is not necessarily hearsay, and is admissible; it makes no difference how the truth of the fact stated in the entry is proved, whether by the one who made the entry or by the one who gave him the facts which he entered. An entry is not incompetent evidence because of a fact not within the personal knowledge of the person making it. It is enough that such entry rests upon knowledge and not hearsay, and is proved to have been correctly made.

Payne v. Hodge, 7 Hun, 612, distinguishing *Gould v. Conway*, 59 Barb., 361, where the correctness of the information upon which entries were made from statements of a third person was not shown by such third person.

Entries and memoranda made by persons, since deceased, in the ordinary course of *professional and official* employment, are competent secondary evidence of the facts contained in them,

when they had no interest to misrepresent or misstate them: *Nichols v. Webb*, 8 Wheat., 326; *Leland v. Cameron*, 81 N. Y., 115; *Patterson v. Turford*, 3 Barn. & Ad., 890, 898, 23 Eng. Com. Law Rep.; *Livingston v. Arnoux*, 56 N. Y., 518; *Porter v. Judson*, 1 Gray, 175; *Gawtry v. Done*, 51 N. Y., 84; *Ocean Bank v. Carll*, 9 Hun, 239, 241, explaining *S. C.*, 55 N. Y., 440; *Welch v. Barrett*, 15 Mass., 379; *Nichols v. Goldsmith*, 7 Wend., 162; *Sheldon v. Benham*, 4 Hill, 129; *State v. Phair*, 48 Verm., 366, 374, 378; *Bank v. Culver*, 2 Hill, 531.

Though not evidence of what *others* had done: *Osborn v. Merwin*, 50 How., 183.

A written memorandum made by an officer against his interest, in respect to a matter pertaining to his official duty, is, after his death, evidence as well of the fact against his interest as of other incidental and collateral facts contained in it; and is admissible irrespective of the question whether any privity exists between the officer and the party against whom it is offered: *Livingston v. Arnoux*, 56 N. Y. 507, 519.

An entry in a rent book in the handwriting of the plaintiff's deceased mother, who had managed his affairs, admitting the receipt of rent by her, held to amount to a recognition by her that certain entries of payments, recorded in the preceding part of the same page in the handwriting of a person since deceased, of rent which ought to have been received by her, represented receipts for which she was accountable, and were consequently admissible in evidence in ejectment on behalf of the plaintiff: *Richards v. Gogarty*, Irish Law Rep., 4 Com. Law, 300, 304-5.

To corroborate the conductor on a railroad in respect to the time of the arrival of his train at a station, evidence is admissible that he made a contemporaneous memorandum, in compliance with a regulation requiring it; and the time table regulating the running, stoppage, etc., of such train may also be proved. So, also, evidence is admissible of the regulations of the corporation, and of the custom of its agents, in respect to giving notice to passengers of the necessity of their changing cars in order to reach a given

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station: *Barker v. N. Y. Cent. R. R.*, 24 N. Y., 599.

Entries made by the discount clerk of a bank can only be proved by the clerk making them, *if alive*, and within the state; and the receiving in evidence statements from other witnesses, made not from personal knowledge, but from entries not thus verified, is error, though such entry be not formally read in evidence: *Ocean Bank v. Carll*, 55 N. Y., 440, 442, explained S. C., 9 Hun, 239; *White v. Ambler*, 8 N. Y., 170.

See *Bank v. Culver*, 2 Hill, 531.

The qualification which restricted the admission of written memoranda to those made in the usual course of business, and as a part of the proper employment of the witness, has been abolished in New York; and every species of memorandum, as for instance, figures computing interest on a note, to show when it was renewed when the witness has no recollection of the date of the computation independent of the paper: *Guy v. Mead*, 23 N. Y., 462.

A memorandum made by a living witness contemporaneously with the facts to which it relates, is admissible in evidence as auxiliary to and not as a substitute for his oral testimony: *Russell v. Hudson*, 17 N. Y., 184; *Marclay v. Shultz*, 29 N. Y., 346; *Crouch v. Parker*, 56 N. Y., 597.

Though in *such case* it is indispensable that the witness should verify the handwriting as his own: *Gilchrist v. Brooklyn*, etc., 59 N. Y., 495; *Kendall v. Stone*, 2 Sandf. Supr. Ct. R., 269; *Brewster v. Doane*, 2 Hill, 537.

But see *Merrill v. Ithaca*, etc., 16 Wend., 586.

In an action in which the question is whether a certain transaction was a sale of property, or a delivery to the defendant as agent of the plaintiff, it is competent to prove an entry made by the plaintiff, in his books, of the transaction as a sale, if accompanied by proof that the entry was subsequently read to the defendant, and he admitted its correctness: *Tanner v. Parshall*, 1 Abb.

Court App. Dec., 356, 3 Keyes, 431; *Meyer v. Reichardt*, 112 Mass., 106; *Lathrop v. Bramwell*, 64 N. Y., 366.

Otherwise if not read to the adverse party, or if so not assented to by him: *Sypher v. Savery*, 39 Iowa, 258; *Meacham v. Pell*, 51 Barb., 65.

After a witness has sworn to the facts in regard to a transaction, he cannot refer to a memorandum to corroborate his testimony: *Sackett v. Spencer*, 29 Barb., 180; *Driggs v. Smith*, 45 How., 447, 86 N. Y. Superior Court Rep., 283; *Pulsefer v. Crowell*, 63 Maine, 22; *Capen v. Crowell*, id., 455; *Com. v. Harper*, 7 Allen, 539; *Meacham v. Pell*, 51 Barb., 65.

See *Townsend, etc., v. Foster*, 51 Barb., 346, affirmed 41 N. Y., 620.

Where a witness testifies that he recollects the *material* part of a transaction, it is not competent for him to refer to a memorandum to refresh his memory by reference thereto: *Flood v. Mitchell*, 4 N. Y. Weekly Dig., 166, Court Appeals; *Driggs v. Smith*, 36 N. Y. Superior Ct. R., 283; *Thurman v. Mosher*, 1 Hun, 344; *Brown v. Jones*, 46 Barb., 400; *Meacham v. Pell*, 51 Barb., 65.

There is some conflict in the cases as to whether a witness who testifies he can give *substantially* or in *substance* the testimony of a witness on a former trial may be allowed to do so. It is held he may, in *Martin v. Cope*, 3 Abb. Court Appeals Dec., 182; *Gannon v. Stevens*, 13 Kans., 449; *Vandyne v. Thayer*, 19 Wend., 162; *Kean v. Commonwealth*, 10 Bush (Ky.), 190.

That he may not, in *Black v. Woodrow*, 39 Md., 194.

A paper purporting to be an oral agreement reduced to writing, which embodies only the result of the conversation and contains language different from that actually used, as well as some provisions not in the verbal contract, and which has never been signed by the parties to it, is inadmissible as a memorandum of what actually took place: *Flood v. Mitchell*, 4 Weekly Dig., 166, N. Y. Court Appeals.

[18 Cox's Criminal Cases, 349.]

COURT OF CRIMINAL APPEAL.

Saturday, Nov. 18, 1876.

(Before Lord Coleridge, C.J., Mellor, J., Lush, J., Pollock, B., and Lindley, J.)

*REG. V. OXENHAM ⁽¹⁾.

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Larceny—Bailee—Bill of exchange—Fraudulent conversion—24 & 25 Vict. c. 96, s. 8.

Prosecutor asked prisoner if he could get bills of exchange discounted, and prisoner replied that if prosecutor was a person of credit he could get his discounted. Three bills were then drawn by prisoner payable to his order, which prosecutor accepted, and delivered to the prisoner to get discounted. The proceeds of the discounting were to be handed to the prosecutor, less the prisoner's commission, or the bills to be returned. The prisoner being pressed by a creditor for a debt of £62 gave one of the bills (being for £200) in payment, representing it as his own bill, and asking the creditor to discount the balance of the bill. The creditor declined to discount the balance, and the bill was not indorsed upon the condition of the creditor's discounting the balance. The jury found that it was the prisoner's intention, when he indorsed the bill, to pass the property in it absolutely to the creditor:

Held, that upon these facts, the prisoner might properly be convicted of larceny as a bailee of a bill of exchange under 24 & 25 Vict. c. 96, s. 8.

CASE stated by the assistant judge of the Middlesex Sessions.

Herbert Oxenham was tried before me at the Middlesex Sessions, on the 28th of July, 1876, on an indictment which charged him with having stolen "a certain valuable security, to wit, a bill of exchange for the payment of £200, the property of Charles Garrett, the said sum of £200 so secured and payable by and upon the said bill of exchange, being then due and unsatisfied to the said Charles Garrett."

It appeared that on the 3d of December, 1875, the prosecutor, *Charles Garrett, called upon the prisoner, who [350] is a licensed victualler, at the house of the latter, and asked him if it was true, as he had been informed, that he, the prisoner, could get bills of exchange discounted. The prisoner answered that he had occasionally done so, and if the prosecutor were a person of credit, he had no doubt he could get his acceptances discounted. Three bills of exchange respectively dated the 3d of December, 1875, one of which, for £200, became the subject of the present indictment, were then drawn by the prisoner, payable to his order three months after date, and were accepted by the prosecutor, and were by him delivered to the prisoner for the purpose of getting them discounted. Before the prosecutor handed these his acceptances to the prisoner, it was agreed between them that the prosecutor should call again upon

(¹) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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the prisoner at the expiration of a fortnight, and then, as to each of the bills respectively, either the proceeds obtained upon the discount of it were to be handed over to the prosecutor, or the bill itself returned to him by the prisoner. The prisoner was to be allowed 5 per cent. commission on each of the bills he might get discounted, and a further sum in the event of his getting all of them discounted. The prosecutor received no value or consideration whatever for either of these acceptances. The evidence was inconclusive as to whether the prosecutor or the prisoner paid for the stamped paper on which the bills were drawn.

On the 10th of December, the prisoner being then indebted to Messrs. Cutler & Robson, in the sum of £62 for goods which they had sold and delivered to him, and being pressed by Mr. Cutler for a settlement of their account, indorsed to them in payment thereof the bill for £200, which is the subject of the present indictment.

He then told Mr. Cutler that he had received this bill in relation to some property belonging to his wife, and said nothing as to its having been intrusted to him to get it discounted. He asked Mr. Cutler to discount the balance, and Mr. Cutler promised to consult his partner before determining whether they would do so or not, but that was to be optional with them, and the bill was not indorsed upon condition that they would do so.

The prisoner was credited with the current bill in his account with Cutler & Robson, and they afterwards declined to advance money upon the difference between the £62 due to them and the amount of the bill. After the 17th of December the prosecutor called repeatedly upon the prisoner and made several applications to him for the bills or the cash obtained upon the discount of them, but could on neither occasion obtain any account from him as to what he had done with them. In February the prosecutor summoned the prisoner before a police magistrate, and that proceeding resulted in the prisoner at once returning to him two of the bills, and the summons was withdrawn upon his promising to return forthwith the other bill (the one now in question), which he assured the magistrate was "in the 351] city, but he had not a *shilling on it." This, however, he failed to do, and it afterwards came to the knowledge of the prosecutor that the prisoner had previously indorsed this bill to Messrs. Cutler & Robson. The prosecutor dishonored the bill, and the said indorsees thereupon brought an action upon it and recovered judgment against him for £62 and costs. Proceedings were then

taken against the prisoner, which resulted in his being committed for trial upon the present charge.

At the close of the case for the prosecution,

The prisoner's counsel objected that there was no evidence that the prisoner had fraudulently converted the bill, and cited, in support of his argument *Reg. v. Weeks* (10 Cox C. C. 244), but I overruled the objection, considering that there were facts in the present case which upon this point distinguished it from that one.

The prisoner's counsel then addressed the jury, and called a witness for the purpose of contradicting the evidence of the prosecutor as to the terms of the alleged bailment; but as the jury expressed their entire disbelief of her evidence, it was unnecessary to refer to it.

After summing up the facts, I directed the jury that if they believed the prosecutor's statement, as to what had taken place at the meeting on the 3d of December, when he accepted the bill and delivered it to the prisoner, the prisoner was to be deemed a bailee of a "valuable security" within the meaning of the act (24 & 25 Vict. c. 96, s. 3) under which he was indicted; but that it was essential to the maintenance of the indictment that they should be satisfied not merely that he had acted contrary to his agreement with the prosecutor and misappropriated the bill, but that he had done so wilfully and knowingly, and that he had in point of fact and practical effect by indorsing the bill to his creditors, Cutler & Robson, converted it to his own use or to theirs in fraud of the prosecutor. Unless they answered all these questions in the affirmative they should acquit the prisoner. The jury found him guilty, and in answer to a question I then put to them, stated that in their opinion it was the intention of the prisoner when he indorsed the bill, to pass the property in it absolutely to Cutler & Robson in payment of their account.

I postponed sentence. My attention was afterwards drawn by the prisoner's counsel to *Reg. v. Cosser* (13 Cox C. C., 187). In deference to the ruling of the learned judge in that case I respite the judgment, and state this case for the opinion of the Court of Criminal Appeal. I liberated the prisoner upon recognizances to appear when called upon.

The questions for the opinion of the court are:

1st. Whether upon the facts stated the defendant was a bailee within the meaning of the above enactment; and

2dly. (If he were) whether there were evidence to go to the jury of a fraudulent conversion.

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Sims, for the prisoner: The indictment is framed upon 352] the 24 * & 25 Vict. c. 96, s. 3: "Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or to the use of any person other than the owner thereof, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny. By sect. 1 (the interpretation clause) the term "valuable security" includes (*inter alia*) any bill, note, or order, or other security whatsoever for money, or for payment of money. It is submitted that the document in question was not a security for money at the time it was dealt with by the prisoner within the meaning of sect. 3 (*sup.*) *Reg. v. Cosser* (13 Cox C. C., 187). In that case the prisoner drew, and the prosecutor at his request accepted, three bills of exchange on the understanding that the prisoner was to deposit them with a third person as security for the purchase-money for the transfer of a license of a public house, and not to negotiate them or use them for any other purpose. Instead of depositing them with the third person, the prisoner converted two of the bills to his own use. Upon these facts it was held that there was no bailment within sect. 3. [LUSH, J.: Strike out the words "valuable security to wit," in the indictment, and then the indictment charges the prisoner with having stolen a bill of exchange. Is that not sufficient?] It is submitted that it is not, for the bill was then of the value of the paper only, and the prisoner is not charged with stealing a piece of paper. In *The King v. Phipoe* (2 Leach's Crown Cases, 774), the prisoner by threats and intimidation, compelled the prosecutor to draw a promissory note on paper, which with pen and ink were supplied by the prisoner, and the prisoner was indicted under the 2 Geo. 2, c. 25, s. 3, which enacts that if any person shall "steal or take by robbery" (*inter alia*) any bills of exchange or promissory notes for the payment of money, notwithstanding any of the said particulars, are termed in law a *chose in action*, it shall be deemed and construed to be felony. In that case, Ashurst, J., said the judges were of opinion that, "as the Legislature at the time of passing the 2 Geo. 2, c. 25, s. 3, whereby the stealing a *chose in action* was made felony, could not possibly have had a case like the present in contemplation, it is not within that statute; that it is essential to larceny that the property charged to have been stolen should be of some value; that the note in the present case did not, on the face of it, import either a general or a special property in the prosecutor, and that it was so far from being of the least value to him,

that he had not even the property of the paper on which it was written, for it appeared that both the paper and the ink were the property of Mrs. Phipoe, and the delivery of it by her to him could not, under the circumstances, be considered as vesting it in him." Here it is submitted that the document was valuable to the prosecutor as a piece of paper only. Secondly, there was no conversion of the bill of exchange by the prisoner. For that proposition, *Reg. v. Weekes* (10 Cox C. C., 224) is an authority. There the prisoner volunteered to get the prosecutor's acceptance [353 for £30 discounted, and thereupon drew a bill which the prosecutor accepted and indorsed and handed to prisoner to get discounted. The prisoner subsequently delivered the bill to a creditor of his, to whom he owed £10, that the creditor might take £10 out of the proceeds after discounting it. And it was held that this did not amount to a conversion by the prisoner analogous to larceny. So in *Reg. v. Jackson* (9 Cox C. C., 505), Martin, B., said: "There are many instances of conversion, sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this statute. The determination of the bailment must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. As, for instance, in case of bailment of an article of silver for use, melting it would be evidence of a conversion. So when money, or a negotiable security, is bailed to a person for safe keeping, if he spend the money, or convert the security, he is guilty of a conversion within the statute." [LUSH, J.: You have the finding of the jury here that the prisoner intended to pass the property in the bill absolutely to Cutler & Robson.]

No counsel appeared for the prosecution.

LORD COLERIDGE, C.J.: I am of opinion that this conviction should be affirmed. The prisoner was indicted under these circumstances: It appears that he, being the drawer of a bill of exchange for £200, which the prosecutor had accepted and delivered to him for the purpose of getting discounted, instead of getting the bill discounted, took it to Cutler & Robson, creditors of his, to whom he was indebted in the sum of £62, and indorsed it to them as his own in payment of the £62; and the jury have found that in their opinion it was the intention of the prisoner, when he indorsed the bill to them, to pass the property in it absolutely to Cutler & Robson, in payment of their account. Now upon these facts we are asked to hold that the prisoner was not a bailee of a bill of exchange for payment of

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money and that he did not convert it to his own use. I should have thought it impossible to doubt that the statute met this very case and that it was intended to suppress frauds of this kind. The case of *Reg. v. Cosser* is inapplicable to the present case. In that case the acceptor of the bills delivered them to the prisoner to be used for one purpose and the prisoner applied them to another. When the purpose for which they had been given failed, and the acceptor applied for the bills, the prisoner said he had destroyed them, and it was not until the acceptor was applied to for payment that he discovered what had become of the bills. Upon those facts I think it was properly held that there was no bailment of the bills within the statute. The present case is entirely different. As to the case of *Reg. v. Weeks*, that case, in my opinion, was rightly decided. In that case the prisoner Weeks received from the prosecutor Batty a bill of exchange for £30 to get discounted. Weeks, not having got it discounted, handed it to a creditor, Bailey, to whom he owed £10, *that he, Bailey, might get it discounted, and keep the £10 Weeks owed him, and hand over the remainder of the proceeds of the discounting to him. And that was held not to be a conversion of the bill of exchange within this statute. But the facts there were not the same as here. Here the jury have found that at the time the prisoner delivered the bill to Cutler & Robson he intended to pass the property in it absolutely to them in payment of their debt. I think, therefore, the conviction should be affirmed.

MELLOR and LUSH, JJ., POLLOCK, B., and LINDLEY, J., concurred.

Conviction affirmed.

See 12 Eng. Rep., 643 note; 14 Eng. Rep., 645 note.

EQUITY CASES

(INCLUDING BANKRUPTCY CASES)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY

[Law Reports, 20 Equity Cases, 373.]

V.C.M., June 21, 24, 1875.

*GIBBS V. DAVID.

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[1875 G. 85.]

Contract to purchase a Mine—Suit to rescind Contract—Appointment of Receiver and Manager.

In a suit by the purchaser of a coal mine to rescind the contract on the ground of fraudulent misrepresentations, it being essential that the mine should be kept in a going state, the court, upon the application of the purchaser, who was in possession of the colliery, appointed a receiver and manager until the hearing.

THIS suit was instituted for the purpose of obtaining a declaration that a contract dated the 1st of November, 1873, for the purchase of a colliery by the plaintiffs, was obtained by fraud, and was void as against the plaintiffs, and that the said contract and certain promissory notes which had been given in part payment of the purchase-money might be ordered to be delivered up to be cancelled. That an account might be taken of the sums received by the defendants, and that they might be ordered to repay what should be found due. That the assignment, a memorandum of deposit which had been given to secure part of the purchase-money, and all other instruments and documents consequential on the contract for purchase, might be dealt with so as to restore the parties as nearly as possible to their original position. That an injunction might be granted to restrain the defendants from parting with or negotiating any of the promissory notes given by the plaintiffs, which were in

their hands, and that a receiver and manager might be appointed to carry on the colliery for the benefit of such persons as might be decided to be the owners thereof, in such manner as the court should direct.

The bill alleged that the plaintiffs had entered into negotiations with the defendant T. S. Webb, who proposed to them to join him (Webb) in the purchase of a coal mine called the Hendredenny Colliery, which had been leased to the defendants David and Sloper, the plaintiffs finding the purchase-money in the first instance. For this colliery the plaintiffs were to pay £30,000; £5,000 in cash and the rest [374] in instalments extending over four *years, to be secured by the promissory notes or bills of the purchasers. The agreement for the purchase was executed, and several of the instalments were paid when the plaintiffs discovered that Webb had been acting as the agent of David and Sloper for the sale of the mine, and that the defendant Thomas Davies was associated with them; that they were all to receive certain portions of the profits arising from the transaction; that Webb had received from David and Sloper a large sum as commission for effecting the sale, and that the mine, which was represented to be of great value, was, in fact, worth much less than the price paid, and at the time of filing the bill had not begun to pay working expenses.

The bill also alleged that it was essential that the mine should to some extent be worked, in order to avoid flooding and other injury, and also to prevent forfeiture to the landlord, and that it would be for the benefit of all parties interested that a receiver and manager should be appointed in the suit, so that the property might be preserved until the hearing, without prejudice to the question whether the plaintiffs were entitled to rescind the purchase, or whether the colliery was to belong to the plaintiffs.

The plaintiffs had entered into possession of the mine.

An interim injunction had been granted to restrain the negotiation of the bills in the hands of the defendants.

Mr. *Glasse*, Q.C., Mr. *Higgins*, Q.C. and Mr. *Hemming*, for the plaintiffs, now moved that a receiver and manager should be appointed to carry on the colliery until the hearing: The object of this bill is to set aside a contract for the purchase of a colliery. If the suit is successful, the defendants will become the owners of the property, but if the bill fails, then the property will belong to the plaintiffs. It is shown that if the mine is not worked it will be seriously damaged by flooding, and it will be in the power of the landlord to forfeit the lease for non-fulfilment of the cov-

enants. The plaintiffs are in possession, and the mine has hitherto been kept up as a going concern, but the expenses of working it are greater than the profits arising therefrom, and the plaintiffs feel that they may be called upon to prove every item of expenditure, and that they have conducted the works in the *most economical manner. [375 This would lead to unnecessary litigation, and throw upon the plaintiffs an obligation which it is unjust that they should bear. Under such circumstances, it is most desirable for all parties that a receiver and manager should be appointed with the sanction of the court, in order that justice should be done to both parties. The right to a receiver rests upon the general principle of the court that it will preserve any property the subject of dispute, pending litigation, and the application is supported by the authority of *Boehm v. Wood* ⁽¹⁾, where a receiver was applied for on the motion of the vendor of an estate pending a reference as to title. In that case the property consisted of buildings and offices, and it was necessary to effect insurances and expend money in repairs, and a bill having been filed for specific performance of a contract of sale of the estate, each party wishing to divest himself of the ownership of the property, the court appointed a receiver until the hearing of the cause, the question being reserved who should bear the expense.

Mr. Cotton, Q.C., and Mr. Macnaghten, for the defendants David and Sloper: The case made by the bill is that the contract was brought about by the fraudulent representations of the defendant Webb, but it is not shown that our clients, Messrs. David and Sloper, were cognizant of these misstatements. If there should be a case for a receiver against Webb, there is none as against David and Sloper. This is a bill to set aside the purchase, the purchasers are in possession, and have carried on the mine ever since the date of the contract. It is, therefore, for them to continue the working of the mine upon their own responsibility, and they have no right to call upon the defendants to bear any extra expense for the appointment of a receiver. It is not the practice of the court in such cases as these to appoint a receiver.

The defendant Webb was not represented.

SIR R. MALINS, V.C.: As far as I know of the case at present, although the precise *circumstances certainly [376 have not occurred before, I cannot help thinking that, upon principle, I shall not much err if I accede to the application of the plaintiffs.

(1) 2 Jac. & W., 236.

The question brought before the court is a very remarkable one. The two plaintiffs, Mr. Gibbs and Mr. Joachim, are, it is stated, merchants in the city of London; and their case is this, that, by representations made to them by the defendant Webb, they have been induced to purchase a colliery in South Wales. They allege that the representations made by Webb were entirely false, and that if they had known the falsehood of such representations they would not have purchased the colliery. The persons from whom the colliery was bought are Mr. Cotton's clients, Charles William David and John Sloper, and, of course, if it turns out that whatever representations were made by Webb they were made without the knowledge of these two defendants, they will not be answerable, and the suit will fail. But the bill alleges that, in point of fact, Webb was the bribed agent of these defendants to make these false representations; and if this turns out to be the truth, and is established at the hearing, the contract will be set aside, the suit will succeed, the plaintiffs will be entitled to be relieved from all further payments, and will take out of court all the moneys paid in and all that may be hereafter brought in. In other words, the contract will be undone. But the property is a colliery, and a going colliery, and both sides admit that it must be kept going or the lease will be forfeited; and, moreover, if it is not kept going it will be drowned out, and therefore it is absolutely necessary it should be worked.

In this state of things, I think it is clearly uncertain to whom the colliery belongs. If the plaintiffs are right in their allegations on the bill, the colliery does not belong to them but to David and Sloper. If, on the other hand, the allegations are erroneous, then the colliery belongs to the plaintiffs, and David and Sloper have nothing to do with it. It is according to the practice of the court to keep property in security until the right is decided, and therefore, it being totally uncertain to which of these two parties this colliery belongs, it does seem to me in accordance with practice and principle that the property shall, as far as possible, be kept in security.

377] *Then, it is asked, why should this be done? The plaintiffs are in possession; they say they were fraudulently induced to take possession, and being in possession they are incompetent to deal with the property in its present position, and if they should succeed in this suit they will have a demand against the defendants for all moneys properly expended in working the colliery. It is of very great

importance that the colliery should be so worked as to leave as little doubt as possible whether it was properly or improperly worked. If the court appoints an officer competent to manage a colliery, and he says, I have carried on the colliery and made a gain, then the gain will belong to the party to whom the mine belongs. If, on the other hand, he says, I have been obliged to carry on the colliery at a loss, that loss will have to be borne by the plaintiffs if they fail in their suit, and by the defendants if the plaintiffs succeed.

Now I will assume in favor of the defendants that all these charges are unfounded and that the suit will fail, and I will continue to act upon that assumption until the contrary is proved. If, therefore, the suit does fail and a receiver is appointed, and he is supplied with the means of carrying on the colliery by the plaintiffs, what damage will be done to the defendants? It is impossible they can be damaged to the extent of a farthing. If, on the other hand, the suit should succeed, then a very material benefit may arise to the plaintiffs in the manner I have pointed out, on its being ascertained in this way what is the proper expenditure in carrying on the colliery. Therefore I shall do what this court is constantly in the habit of doing where property is in dispute and as was done in *Boehm v. Wood* ('). There it was uncertain to which of two parties the estate belonged, because, although the plaintiff was the vendor, he had sold it to Wood. Wood took objections to title, and, if those objections were well founded, the estate belonged to the vendor, and if they were unfounded it belonged to Wood. A receiver was appointed upon the principle that it was uncertain to which of the two parties, plaintiff or defendant, the estate belonged. It seems to me in this case that the court should appoint a protector or manager of the estate, in order that when it is decided to whom it belongs *justice may be done. Therefore upon prin- [378 ciple, and I think upon authority, I shall accede to the application that a receiver be appointed. The plaintiffs must supply the means of carrying on the colliery, and, as in *Boehm v. Wood* ('), the question at whose expense the receiver is to be appointed and the colliery is to be carried on will be reserved. If the suit succeeds it will be at the expense of the defendants. The receiver's duty will be to keep the colliery going, and out of his receipts he will pay all the outgoings, and, so far as they are insufficient, the plaintiffs must undertake to supply him with the money

(') 2 Jac. & W., 236.

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required. The plaintiffs will nominate a receiver, and the defendants will be heard in Chambers; but it will be my duty to see that a man is appointed who is skilled in the management of collieries and who will do the best he can for both parties. The defendants must also undertake not to negotiate the bills in their possession.

Solicitors for the plaintiffs: Messrs. *Miller & Wiggins*.

Solicitors for the defendants: Messrs. *Cunliffe & Beaumont*.

[Law Reports, 20 Equity Cases, 378.]

V.C.M., June 25, 1875.

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[1858 C. 31.]

Will—Words—Benefit of Survivorship—"Survivors," when read "Others."

A testator directed the income of the residue of his estate to be divided between all his sons as tenants in common, with benefit of survivorship between them, in case any or either of them should die without issue, and in case any child or children who should be entitled under the trusts of his will to any principal money, or income, should die leaving issue, the principal money, or share, from which the interest of such child or children should be derived, should go to and be divided amongst such issue as tenants in common.

The testator left five sons, two of whom died leaving issue, and three died without issue, the last survivor of the five dying without issue:

Held, that on the death of the last surviving son the principal set free accrued to the children of the sons who had died leaving issue.

JOHN CROSS, by his will, dated the 10th of September, 1835, after providing for his daughters and various members 379] of his *family, directed his trustees to divide the dividends, interest, and income to arise from the clear residue of the proceeds of his estate, between and amongst all his sons, as tenants in common and not as joint tenants, with benefit of survivorship between or amongst them in case any or either of them should die without leaving lawful issue, and it was his will that in case any child or children who should be entitled under the trusts of that his will to any principal money, or income, should die leaving lawful issue, the principal money, or share from which the interest of such child or children should be derived, should go to and be divided amongst such issue, share and share alike, as tenants in common.

The testator died in January, 1836, leaving five sons and eight daughters; one of his sons, Samuel Cross, died in 1837 without having been married; Francis died in 1862 without leaving issue; James died in 1872 leaving issue; John died in 1873 leaving issue; and Alexander, the

last survivor, died in January, 1875, without having been married.

A suit was instituted in February, 1858, for the administration of the testator's estate, and the shares of the several sons were carried over to separate accounts.

The present petition was presented upon the death of Alexander Cross, the last survivor of the five sons of the testator, by the children of the two sons who died leaving issue, praying that the capital sum, representing the share of the late Alexander Cross, might be ordered to be divided into two equal parts, one part thereof to be divided between the children of John Cross, one of the sons, and the other moiety to be divided between the children of James Cross, the other son, who died leaving issue.

Mr. *Higgins*, Q.C., and Mr. *Shebbeare*, in support of the petition: There can be no doubt as to what the intention of this testator was, and that intention may be carried out by construing the term "with benefit of survivorship amongst them in case any or either should die without issue," to mean the benefit of the others who should die leaving issue. The court will always construe the word "survivor" as "other," to carry out the evident intention of the testator. This was decided in *Badger v. [380 Gregory]* (*), in *In re Arnold's Trusts* (*), in *Waite v. Littlewood* (*), and more recently by your honor in *In re Palmer's Settlement Trusts* (*). In all these cases the word "survivor" was read "other," and there can be no doubt that the intention of the testator in each of the cases was carried out by such construction.

Mr. *Waller*, Q.C., and Mr. *Harvey*, appeared for persons in the same interest.

Mr. *Romer*, for the representatives of Alexander Cross: These words, "with benefit of survivorship," do not occur in any of the cases cited, and they are not words that can be brought within the principle as to reading the word "survivor" as "other." There is a still more fixed principle, which is to give every word its literal meaning, and that may be done in this case. Here the testator gives the dividend, interest, and income of his estate between and amongst all his sons as tenants in common; the benefit of survivorship only applies to the life estate of the sons, and there could be no benefit of survivorship on the death of the last survivor. The use of the words "principal money, or income," shows that the testator contemplated one son tak-

(1) Law Rep., 8 Eq., 78.

(5) Law Rep., 8 Ch., 70, 73.

(2) Law Rep., 10 Eq., 252.

(4) Law Rep., 19 Eq., 320.

ing the whole. An indefinite gift of dividends passes the absolute property of stock: *Page v. Leapingwell* ⁽¹⁾. In the case of *Dowling v. Dowling* ⁽²⁾, where the expression was "the interest to be divided half-yearly between my four sons, and at the decease of either without lawful issue, such share to revert to the remainder," it was considered to be an absolute gift to the sons, subject to this condition, that upon the death of either of them without issue, the share was to revert to the remainder then living, or their children; and that the children were not to take any interest as against their parents.

It is submitted, therefore, that in this case there is an absolute gift, subject to be curtailed only in case of death without issue in the lifetime of any of the other brothers; or otherwise there is a gift of life interests, with a gift over 381] in case of no issue, to the *other brothers who should be alive; but if no others should survive, then there would be an intestacy.

The principle is well defined by Mr. Vaughan Hawkins, in his book on Wills ⁽³⁾, in these words: "Where there is a gift to several, or to a class, as tenants in common in tail, with remainder as to the share of each to the 'survivors' or 'surviving' devisees in tail, with a limitation over on failure of issue of all the devisees, the words 'survivor' or 'surviving' will be construed as 'other,' so as to create cross-remainders among the devisees by express limitation either in a deed or will. Although in other cases 'surviving' may be read as 'other' if the case require it, the later authorities are adverse to this construction. Thus, if personal estate be given to several, or to a class, as tenants in common, either for life or absolutely, with a gift over of the shares of those dying without issue to the survivors, but without a gift over on failure of issue of all, the word 'survivor' will be construed strictly."

This case is an exact illustration of the principle there defined—that the word "survivor" will not be read "other" unless there is a gift over on failure of all the tenants for life without issue. In *In re Palmer's Settlement Trusts* ⁽⁴⁾ there was a gift over, but here there is none.

SIR R. MALINS, V.C.: This will is not very astutely expressed, but there is sufficient to show the intention of the testator.

There is no rule more clearly established than this, that when the intention of a testator is clearly manifest the court

⁽¹⁾ 18 Ves., 463.

⁽²⁾ Law Rep., 1 Ch., 612.

⁽³⁾ Page, 202.

⁽⁴⁾ Law Rep., 19 Eq., 320.

will endeavor to carry out that intention as far as the words will permit: [His honor then stated the terms of the will.] The testator had five sons. Two of them died leaving issue, and the other three died without issue, including Alexander, the last survivor of the five sons.

It cannot be denied that when the testator says "with benefit of survivorship if any die without leaving issue," that he intended the share of each child to go over. I think the intention is *expressed that whatever interest the [382 children take, the sons are to be tenants for life. How is it to go over, and what benefit of survivorship is there to be? It cannot depend on the circumstance whether the son who might die without issue should survive the other sons. I cannot express the principle better than I have done in *In re Arnold's Trusts* (1) and in *In re Palmer's Settlement Trusts* (2), that the word "survivor" must be read as "other" whenever the meaning renders it necessary.

In *In re Palmer's Settlement Trusts* I referred to several cases, all of them authorities in favor of reading the word "survivor" as "other" when it was requisite to do so, in order to give effect to the intention. There is no magic in the word "survivor." The benefit of survivorship meant that it was to go over if any one died without issue.

The intention is that each child shall only be tenant for life in what he takes, and then the issue take *per stirpes* of that family. If one left a family, that class would have the benefit of survivorship to the one who so died leaving children; but if any died without children, then the children of the others would have the benefit of survivorship as to the shares which would have come to their respective parents. Mr. Romer relied on *Dowling v. Dowling* (3). There the property was directed to be invested and the interest to be divided half-yearly between the four sons of the testator, and at the decease of either without issue such share to revert to the remainder then living, or their child, or children. When the case came before Vice-Chancellor Stuart he decided that the four sons took only an estate for life with an estate by implication to the issue living at their death as joint tenants; but upon appeal the Lords Justices reversed that decision, and held that each of the four sons took an absolute interest in his share subject to be divested in case of his dying without leaving issue. The children were not to take any interest as against their parents, but if the parents were out of the way then the intention was that the children were to take in their place. Therefore that case

(1) Law Rep., 10 Eq., 352. (2) Law Rep., 19 Eq., 320. (3) Law Rep., 1 Ch., 612.

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does not support Mr. Romer's argument, because it shows that if one died without leaving issue his interest would be 383] divested *and would go to the remainder; but if all the others were dead it would go to the children in their place. So here the share of Alexander Cross upon his death without children went over to the children of the other sons who had died leaving issue, and the children of each of the two sons who died leaving issue will take the share to which their father would have been entitled.

Solicitors for the petitioners: Messrs. *Hensman & Nicholson*.

Solicitors for the respondents: Messrs. *Jackson, Fox & Eller*.

[Law Reports, 20 Equity Cases, 383.]

V.C.M., June 28, 1875.

MACDOUGALL V. GARDINER.

[1874 M. 200.]

Practice—Company—Frame of Suit—Bill against Directors—Right of individual Shareholder to sue—Fraud—Ultra vires—Constitution of Company—Authority of Chairman of Meeting.

An individual shareholder in a company is entitled to file a bill against the directors on behalf of himself and all other shareholders except the defendants, if he alleges that the directors, or some of them, have so acted as to prevent a majority of the members from exercising a proper control over the affairs of the company.

The articles of association of a company gave power to the chairman at any general meeting of the company, with the consent of the meeting, to adjourn the meeting, and also provided for the taking a poll if demanded by five shareholders. At a general meeting of the company the adjournment of the meeting was moved, and on being put was declared by the chairman, who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the chair. The shareholders who sided with the plaintiff then passed a resolution, among others, removing one of the directors:

Held, on bill filed by a shareholder averring these facts, and charging that the directors, or some of them, had combined to take this course with the view of stifling discussion, that this made a case of improper conduct, bordering upon fraud, which entitled the plaintiff to maintain his suit for restraining proceedings by the directors, which the plaintiff and his party desired to prevent.

DEMURRER. This was a bill filed by Alexander William MacDougall on behalf of himself and all other shareholders 384] in the Emma Silver Mining *Company, except the defendants, against the directors and the company.

The bill, after stating that the company was incorporated in November, 1871, for the purpose of working a mine in the United States of America, called the Emma Silver Mine, set out several of the articles of association, amongst which were those numbered 40 and 42, which provided for sum-

moning special general meetings, and 45, which enabled any member to propose and introduce at a general meeting any subject relating to the affairs of the company of which he had given a certain notice, and 49, 50, and 51, which were as follows:

"49. The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

"50. At any general meeting, unless a poll be demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of the proceedings of the company, shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favor of or against such resolution.

"51. If a poll be demanded by five or more members, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting the chairman of the meeting shall be entitled to a second or casting vote."

The bill also, after stating that the plaintiff became a shareholder in the company in 1874, and was, when the bill was filed, the registered holder of 1,750 shares in the company, alleged that prior to the month of May, 1874, circumstances had come to the knowledge of the plaintiff and a large number of other members of the company leading to the conviction on their parts, as the facts were, that various fraudulent transactions had been carried on in connection with the purchase of the Emma Mine by the promoters of the company, which transactions had, in fact, been gross frauds upon the members of the company. The plaintiff *and the other members of the company also believed [385 that some of the then and present directors of the said company were to some extent interested in these matters adversely to the company. The plaintiff and such other members of the company were consequently very desirous that some person who would make endeavors to have the matters connected with the purchase and with the promotion and formation of the company investigated, should be elected at the election of new directors of the company, which would take place in or about the month of May, 1874. Accordingly, efforts were made by a large number of members of the company to obtain the election of the plaintiff as

a director, he being willing and desirous to make such endeavors on being appointed a director, without any remuneration, until such remuneration could be paid out of profits earned by the company, and made this an express stipulation at the meeting. With this object a large number of the members of the company, holding, as the plaintiff alleged, a clear majority of votes, in or about the month of May, 1874, agreed to vote in person, or to give their proxies at the said election to or in favor of the plaintiff.

The existing directors desired to have a Mr. Hutton appointed a director, and on the 15th of May, 1874, the general meeting of the members of the company was held, and on the question of the election of a new director the chairman declared, on a show of hands, that Mr. Hutton had been elected. A poll was then duly demanded on behalf of the plaintiff, and the result was in favor of Mr. Hutton. The plaintiff had then filed a bill for the purpose of raising some questions as to the alteration of the register of shareholders between the holding of the meeting and the taking of the poll, and moved for an injunction. Demurrers were, however, filed by the defendants to that suit, which prevented the motion being heard before the long vacation of 1874.

The plaintiff and other shareholders thereupon signed and sent to the office of the company a requisition, which was set out in the bill, calling upon the directors to convene an extraordinary general meeting for the purpose of requesting the chairman, who was the demurring defendant, Colonel Gardiner, to resign his directorship and to appoint another director in his place.

386] *This requisition was signed by members of the company holding more than one-fifth of the capital of the company, and was left at the office of the company on the 8th of September, 1874, and other copies were afterwards signed by other shareholder and left at the office of the company.

On the 24th of September, 1874, the plaintiff was informed that the directors did not intend to convene a special meeting, and he issued a fresh circular.

On the 6th of October, 1874, the directors issued a notice convening a special general meeting for the 14th of October.

The defendants were, in fact, doing all they could to prevent the meeting being held, and had it not been for the plaintiff's second circular they would not have convened such meeting, and the plaintiff alleged that in giving so short a period between the notice and the day of meeting

the directors gave as little time as possible to the shareholders to decide as to the course they would take, fearing they would side with the plaintiff.

It then appeared that the defendant Gardiner had gone to America with reference to some litigation then pending there with reference to the property in the mine, and had taken many of the most important books and papers of the company with him. Those books and papers were, in fact, necessary for the full investigation of the matters in this country which the plaintiff and the other members of the company required.

The plaintiff received proxies authorizing him to vote at the special meeting, from shareholders holding 15,000 shares, while the directors did not receive proxies to an extent reaching one-half of the number of shares represented by the plaintiff. Previously to the meeting, the directors sent stamped proxies round to each of the shareholders, empowering Mr. Hutton to vote for them at the meeting and at any adjournment.

The plaintiff prepared several resolutions for the purpose of proposing them at the meeting, which were set out in the bill; the two first of which were as follows:

"1. That in the opinion of this meeting it is not consistent with the best interests of the company that Mr. Robert May Gardiner should remain a director of the company, and that he accordingly be requested to resign his office.

*"2. That the said Mr. Robert May Gardiner not [387 being present to meet the shareholders of this company, after the requisition calling this meeting (first lodged on the 8th of September last), and signed by shareholders, he is now removed from the office of director, and that Mr. be appointed a director in his stead."

The meeting took place on the 14th of October, 1874, Mr. Hutton being in the chair. He addressed the members, and urged an adjournment of the meeting, partly on the ground that a petition to wind up the company had been presented by a shareholder, and that it was expedient to postpone the discussion of the matters before the meeting until after the petition had been disposed of. The plaintiff proposed the first resolution, and it was discussed by the chairman. Various trivial objections were taken to it, such as that it ought to have embraced the appointment of a new director as well as a request to Gardiner to resign. On that ground Mr. Hutton refused to put the first resolution to the meeting, although Mr. Burnand, the only other director present, openly dissented from that view. In the midst of the dis-

cussion which followed, and after the plaintiff had pointed out that if the resolution were passed he would follow it up by others, copies of which the chairman held in his hand, a member proposed the adjournment of the meeting for a month. This proposal was seconded, and the chairman then put the resolution to the meeting, and declared it to be carried.

The 25th, 26th, and 27th paragraphs of the bill contained in substance the following allegations :

25. The friends of the directors voted in favor of the resolution, while the plaintiff and the shareholders acting with him voted against it; and the chairman declared, on the show of hands, that the resolution had been carried. Five members of the company then present, including the plaintiff, demanded a poll; but the chairman refused to grant one, on the alleged ground that a poll could not be taken on the question whether the meeting should be adjourned or not, at once left the chair, declaring the meeting adjourned, and immediately left the room; but the demand for the poll was duly signed and handed in.

26. There was no ground under the articles of the company, or *otherwise, for holding that a poll could not be taken upon whether the meeting of the company should be adjourned or not, especially when by the motion for adjournment the question before the meeting was, whether certain important matters should then be discussed and voted, or whether they should be postponed for a long or indefinite time. Mr. Hutton, however, had, in order to stifle the discussion, and to prevent the matters being voted upon to consider which the meeting was called, in collusion with the other directors, or some of them, determined to carry a vote of adjournment by show of hands and then to refuse a poll on that question, so as to prevent the proxies given to the plaintiff and his supporters from being used in support of the resolutions which he was about to bring forward, and which would undoubtedly have been passed but for the conduct of the defendants.

27. After the poll had been refused several of the members of the company, including the directors, left the room, but a large number still remained, who voted the plaintiff into the chair, when the plaintiff's resolutions were passed, the name of Charles Henry Dunhill, M.D., of York, a duly qualified shareholder in the company, having been first added to the second resolution, he having been proposed and seconded and duly elected as a director of the said company in place of Colonel Gardiner.

The 28th paragraph of the bill set out a letter by the plaintiff giving notice to the directors of the passing of the resolutions after Mr. Hutton had left the chair, and the allegations concluded as follows :

"29. In this state of things the plaintiff and the other shareholders in the company believe, and it is the fact, that the defendant, the directors of the said company, are about to conclude some arrangements with the persons against whom the plaintiff has claims, such as the original vendors of the said mining property to the defendant company, or the promoters of the said company, and others, for the purpose of settling those claims, to the great injury of the company and the shareholders therein, and without first submitting those terms to the shareholders of the said company; and the plaintiff apprehends, and the fact is, that the proposed compromises will at once be carried through unless the defendants are restrained from so doing by the order of *this honorable court. The danger is in fact so immi- [389 nent, that it is impossible for the plaintiff and those acting with him to call another meeting for the purpose of removing all the directors of the company from their office, or for any other purpose which might effectually stop the said compromises, in time to prevent their being carried out; and even if such another meeting could be convened in time, the defendants, by the same proceeding as they adopted at the meeting of the 14th day of October, would be again able to break up and would succeed in breaking up the said meeting by improperly deciding that it was adjourned by a mere show of hands held up by a few friends or nominees of the said directors who are interested in putting an end to all further investigation into the aforesaid matters.

The bill prayed for a declaration that the refusal to grant a poll on the question whether the meeting should be adjourned at the meeting of the 14th of October was illegal and improper, and for an injunction to restrain the directors from concluding any arrangements with respect to legal proceedings commenced or to be commenced against the vendors of the property to the company, or with any other persons, until such arrangement, if proposed, should have been submitted to the shareholders in the company, and should have been approved of by them; and for a declaration that Gardiner had ceased to be a director, and might be restrained from acting as such director, or that a meeting of the shareholders should be summoned for the purpose of submitting the plaintiff's resolutions to them.

At the time the bill was filed a petition to wind up the

company was pending, and until it was heard, which was not till April, all proceedings in the suit were stayed. The petition having been dismissed, Colonel Gardiner demurred.

Mr. *Higgins*, Q.C., and Mr. *Wintle*, in support of the demurrer: There are two grounds of demurrer. First, the bill ought to have been in the name of the company. This is the rule laid down on the appeal in *Gray v. Lewis* ⁽¹⁾, following *Mozley v. Alston* ⁽²⁾ and *Foss v. Harbottle* ⁽³⁾. A bill 390] in the name of the *company does not require to have the seal of the company affixed to it, or to be filed with the leave of the directors, but it is required to be in the name of the company in order to confer on the majority of the members of the company power to enforce their views upon the directors, and to give them the control over any litigation which may be commenced by persons acting in the name of the company, so that if they disapprove of any litigation thus commenced they may bring it to an end by passing a resolution to that effect: *Exeter and Crediton Railway Company v. Buller* ⁽⁴⁾. The only exceptions to this rule are where there is a case made of some fraud committed by the directors in the name of the company, or where something absolutely *ultra vires* has been attempted to be done, as in *Clinch v. Financial Corporation* ⁽⁵⁾, *Macdougall v. Jersey Imperial Hotel Company* ⁽⁶⁾, and *Menier v. Hooper's Telegraph Works* ⁽⁷⁾. The other ground on which the interference of the court is allowed is where a course has been adopted by the company injurious to some only of the members, as in *Const v. Harris* ⁽⁸⁾, *In re London and Mercantile Discount Company* ⁽⁹⁾, and *Atwool v. Merryweather* ⁽¹⁰⁾.

None of these exceptions apply to the case made by the present bill, which simply relates to matters concerning the internal management of the company, as to which the court will not interfere.

The second ground of demurrer is that the allegations of the bill do not support the prayer. The facts alleged must be sufficient of themselves to found the relief prayed: *In re Stranton Iron and Steel Company* ⁽¹¹⁾. The allegations on this bill are vague and general, as in *Hayman v. Governors of Rugby School* ⁽¹²⁾. As regards the question of the poll the ruling of the chairman was quite right. A poll means a reference of the question in dispute to the whole constitu-

(1) Law Rep., 8 Ch., 1035.

(2) 1 Ph., 790.

(3) 2 Hare, 461.

(4) 5 Railw. Cas., 211.

(5) Law Rep., 5 Eq., 450.

(6) 2 H. & M., 528.

(7) Law Rep., 9 Ch., 350.

(8) T. & R., 496.

(9) Law Rep., 1 Eq., 277.

(10) Ibid., 5 Eq., 464, n.

(11) Ibid., 16 Eq., 559.

(12) Ibid., 18 Eq., 28.

ency, not merely to those present at the meeting, and the poll must be kept open for a reasonable time: *Hodges on Railways* (¹); *Reg. v. Cooper* (²). It is therefore a process quite inapplicable to a question of adjournment.

*The broad ground of the demurrer is that the alle- [391] gations of the bill only show the existence of disputes as to the internal management of the company.

Mr. *Glasse*, Q.C., and Mr. *Robinson*, Q.C., for the bill: The answer to the first ground of demurrer is that this bill comes within the exceptions to the rule, which requires bills filed on behalf of a company to be in the name of the company. The excepted cases are stated by Mr. Justice Lindley in his work on the Law of Partnership (³). *Foss v. Harbottle* (⁴) states the general rule. *Atwool v. Merryweather* (⁵) which is precisely in point, illustrates one of the exceptions. It was a case where, as here, a majority of the *bona fide* members of the company supported the litigation, but they were in danger of being overborne by a minority in collusion with two directors who acted fraudulently. *Menier v. Hooper's Telegraph Works* (⁶) illustrates the other exception to the relief asked for being such as only a minority were interested in. On the allegations of this bill this case is brought distinctly within *Atwool v. Merryweather*. It is expressly alleged that the proceedings of the directors were taken with a view to stifle discussion. That is an allegation of fraudulent conduct, which is necessarily *ultra vires*.

On the second ground of demurrer the refusal to grant a poll is sufficient of itself to support the bill. The demand for the poll was duly made in accordance with the articles of association, and the refusal was a distinct violation of the constitution of the company, and a poll is the positive right of the shareholders if duly demanded: *Campbell v. Maund* (⁷); and the only remedy for refusing to take it is by bill: *Elt v. Burial Board of St. Mary, Islington* (⁸). This is moreover a demurrer by one defendant only, and if it is allowed the suit will not be brought to an end.

Mr. *Higgins*, in reply.

SIR R. MALINS, V.C.: This bill relates to the affairs of a company which have occupied *a great deal of the [392] time of this court, and I am bound to say, a great deal more than they deserve. I think it most unfortunate that

(¹) 5th ed., p. 49, note (y).

(²) Law Rep., 5 Q. B., 457.

(³) 3d ed., p. 935.

(⁴) 2 Hare, 461.

(⁵) Law Rep., 5 Eq., 464, n.

(⁶) Law Rep., 9 Ch., 350.

(⁷) 5 A. & E., 865.

(⁸) Kay, 449.

in the present state of things, with the knowledge that has been acquired, the defendant should have elected to demur to this bill. It has lead to a most unfortunate occupation of the time of the court, and I am now called upon to decide the rights of the parties upon allegations which, I have no doubt, if I were at liberty to go into the evidence upon the subject, would turn out to be almost wholly erroneous. I must regard and consider Colonel Gardiner as acting on behalf of himself and the others in the same position, and he has elected to take the opinion of the court upon allegations in the bill, which certainly do not fall short of charging him and those associated with him with gross acts of impropriety, if not acts of fraud. But as the parties have insisted in having the demurrer heard, I can only decide the question upon the facts stated in the bill, which are admitted by the demurrer to be accurately stated, and I agree with Mr. Glasse that I must, for the purpose of deciding this demurrer, exclude all the knowledge which I have acquired since the month of October last of the affairs of this company. The question I have to decide is whether the allegations of this bill entitled the plaintiff, on the day it was filed, namely, the 19th of October last, to sustain it against Colonel Gardiner, who has demurred, and against the other defendants who cannot demur, but who, no doubt, if they could, would take the same course of defence.

Now, with regard to the question whether the plaintiff can or cannot maintain this suit, there have been so many authorities cited, and so many principles adverted to, and I have myself had occasion to consider the subject so often—some of the decisions cited being mine—that I may consider the law to stand thus: In all matters of internal regulation of a company where the company has acted within its own powers, an individual shareholder cannot sustain a bill in this court relating exclusively to such internal affairs of the company. If, therefore, the directors are acting in one mode, and a shareholder thinks it would be much more wise to act in another mode in a matter of internal arrangement, he must be bound by the will of the majority; and his proper course is, not to come to this court for relief, but to 393] call a *meeting of the shareholders, in pursuance of the constitution of the company, to take the decision of the majority, which must be binding upon him. That is the rule when the directors are acting within the line of their authority. That was decided in the cases of *Foss v. Harbottle* (¹), *Mozley v. Alston* (²), and in a case of *Lord v. Com-*

(¹) 2 Hare, 461.

(²) 1 Ph., 790.

pany of Copper Miners ⁽¹⁾, which all go upon the same principle, which is, that as to the internal arrangements of the company a bill cannot be sustained. I take it to be equally clear that if a company exceeds the limits of its authority in the exercise of its powers, that is, goes beyond its constitution, as, for instance, if a coal mining company were to embark in smelting iron, then any individual shareholder can sustain a bill to prevent their going beyond their powers. I stated this, I believe correctly, in a passage in my judgment in *Gray v. Lewis* ⁽²⁾: "It was strongly urged that this is not a case in which a shareholder can maintain the suit on behalf of himself and the other shareholders, because the right of maintaining such a suit is limited to cases in which the acts complained of are *ultra vires* of the company, that the acts here complained of are capable of being released or confirmed by the company, and that the company itself are, therefore, the only proper plaintiffs, on the principle of *Foss v. Harbottle* and *Mozley v. Alston*. But here the very ground of the complaint is that the guarantee given by the company was beyond its powers, and the case, therefore, is one in which the bill is properly filed by a shareholder to assert the rights of himself and his co-shareholders against the illegal acts of the company, and it falls, in my opinion, within the principle of the present Lord Chancellor's decision, when Vice-Chancellor, in *Atwool v. Merryweather* ⁽³⁾. This objection to the frame of the suit, therefore, in my opinion, fails." If, therefore, the acts complained of are acts beyond the powers of the company, an individual shareholder can maintain a suit to keep them within the limits of their authority.

But there are other acts which, I think, a shareholder can sustain a bill to restrain besides acts beyond the authority of the company. When the company itself is guilty of improper or *fraudulent conduct, as when [394 the directors act in an overbearing manner, which is as much beyond their power as if they were going into foreign objects, because it is their duty to act fairly and honorably in the conduct of the business, or if they act in a fraudulent manner, I take it that an individual shareholder can maintain a bill to restrain them from such acts. I believe the law is correctly stated in the passage of Mr. Justice Lindley's treatise on the Law of Partnership, which was cited by Mr. Glasse ⁽⁴⁾, in which it is said, "A court of equity will not interfere between partners merely because

⁽¹⁾ 2 Ph., 740.

⁽²⁾ Law Rep., 8 Eq., 541.

⁽³⁾ Law Rep., 5 Eq., 464, n.

⁽⁴⁾ 3d ed., p. 985.

they do not agree. It is no part of the duty of the court to settle all partnership squabbles; it expects from every partner a certain amount of forbearance and good feeling towards his copartner; and it does not regard mere passing improprieties arising from infirmities of temper as sufficient to warrant a decree for dissolution or an order for an injunction or a receiver." In support of this view many authorities are cited, and he continues: "And when partners have themselves agreed that the management of their affairs should be intrusted to one or more of them exclusively, the court will not remove the managers, or interfere with them, unless they are clearly acting illegally and in breach of the trust reposed in them." Then comes this passage: "This principle has been extended to companies, and, as a general rule, it may be stated that a court of equity will not interfere between members of companies for the purpose of enforcing duties arising out of matters which are properly the subject of internal regulation. It will not interfere to control a majority unless it sees that the majority has been or is doing or is about to do that which it is illegal for a majority to do."

Therefore, upon that principle, wherever the court sees that the acts to be restrained are not merely *ultra vires*, but of a fraudulent character, or acts which even the majority ought not to be permitted to do, this court will entertain a bill to restrain such acts, and it is in vain to demur to such a bill upon those grounds.

Therefore I desire to be understood as expressing the opinion, first, that when the acts complained of are *ultra vires*, and, *secondly, when they are not *ultra vires*, but are of a fraudulent or improper character, then the remedy of the shareholders is to file a bill in this court to restrain those improper acts because of their being fraudulent or having an improper tendency, and the objects of the company being to act fairly and properly in all transactions, they are just as much *ultra vires* as if they were for a purpose foreign to the constitution of the company.

If I am right in that conclusion, it follows that the question here is whether the allegations of this bill show conduct on the part of the directors, or on the part of the company, which it is impossible for the directors of the company to pursue.

[His honor then read those clauses of the articles of association stated above, and read and commented on the paragraphs of the bill relating to the meeting of the 14th of October, and continued :

If the chairman has the absolute power of declaring that the meeting concurs in a resolution, and his declaration is conclusive, this meeting was properly adjourned, and the great bulk of the plaintiff's complaint falls to the ground. But I am of opinion that he has not such an absolute power, and it would be very unreasonable if he had, because there might be a chairman capable of acting in an unfair and fraudulent manner; and although the voice of the meeting were one way, he might declare it to be another, and therefore all assemblies require to be protected against that kind of conduct, and this company is protected by the 50th of the articles of association. The demand for the poll was duly signed and handed to the chairman of the company, and I have no hesitation in coming to the conclusion that he was bound to accede to the demand. It is not necessary for me to consider whether a poll should be then and there or at some future time taken, because it was not on that ground that the chairman refused the poll, but he absolutely declined to take any poll whatever, and made his own voice conclusive, which by the constitution of the company it was not. That was so improper a proceeding, that, in my opinion, it would of itself entitle the plaintiff to come to this court to ask for relief.

• Then it does not depend on that only. I must take every allegation and statement properly pleaded and alleged to be true. * [His honor then read and commented on [396 the remaining paragraphs of the bill, and continued :]

Upon the face of this bill the directors are charged with intending to defraud the shareholders, and to carry those fraudulent intentions into effect by means of holding a colorable meeting, packed and composed of individual shareholders of small amount, and by not allowing the shareholders who are represented by their proxies to have any voice in the matter, and thus carrying their fraudulent intentions into effect; and to such a bill as that the defendant has thought fit to demur. It is very true that he individually was not present at the meeting; so far, therefore, he is not accused of being a party to the transactions. But if, where there are these charges of fraudulent conduct, and fraudulent conduct being beyond the powers of a company, this court cannot be resorted to by an individual shareholder who cannot command a majority to enable him to use the name of the company, there would be power in the directors of a company to carry into effect any fraudulent scheme they might think fit to adopt.

Now many cases have been cited. I have adverted to

some of them, and I think the case which Mr. Glasse relied on particularly, the case of *Menier v. Hooper's Telegraph Works* (¹), where an individual shareholder sustained a bill charging fraudulent conduct by the majority of shareholders, on the principle that it was beyond his power otherwise to prevent such conduct taking place.

The case of *Atwood v. Merryweather* (²) was a remarkable one also, and I had occasion to refer to it in the case of *Gray v. Lewis* (³); for there, although the Vice-Chancellor Wood was compelled to allow a majority of the members of a company to take a bill filed in the name of the company off the file, yet, on the proof of the existence of fraudulent conduct on the part of some of the members, he allowed the bill to be sustained by individual shareholders.

On these grounds, therefore, being of opinion that the allegations of this bill do show improper conduct on the part of the governing body, that there has been a mischief committed which ought not to continue, and that it is shown [397] on the allegations in the bill, *which are admitted to be true upon demurrer, that there is conduct which is illegal, or which a majority ought not to adopt, the suit can, in my opinion, be sustained in the name of an individual shareholder. The demurrer, therefore, must be overruled, with the usual result as to costs.

Solicitors: Messrs. *Valpy & Chaplin*; Messrs. *Bischoff, Bompas & Bischoff*.

(¹) Law Rep., 9 Ch., 350. (²) Law Rep., 5 Eq., 464, n. (³) Law Rep., 8 Eq., 541.

The officer whose duty it is to preside at a meeting of a body of stockholders or other public body cannot, by arbitrarily leaving the meeting, break it up or destroy its power to act. The presiding officer cannot override the will of the meeting: *People v. Allen*, 51 How. Pr., 102.

At a meeting of the township council the Reeve who was in the chair refused to put a motion which had been duly made and seconded, whereupon the members voted upon the motion without its being put by the chairman, and a majority were in favor of the motion. Held, that the Reeve had no right to refuse to put the motion, and that the vote was proper and effectual: *Township of Brock v. Toronto, etc.*, 17 Grant's (U.C.) Chy., 425.

In *Preston v. Township of Mauvres*, 21 U. C. Q. B., 626, the Reeve of the township being opposed to a by-law regularly passed while he was present

and presiding, refused to sign it or affix the township seal. By direction of the council the Deputy Reeve then took the chair, and signed and sealed the by-law. Held, valid, and the court discharged with costs a rule afterwards obtained by the Reeve to quash it, the court saying (p. 628), "When the Reeve of a township, either from caprice or obstinacy, chooses to refuse to do his duty in passing a by-law which is required for the benefit of his township or part of it, we think the remaining members of the council must be quite justified in requiring the Deputy Reeve to do what the Reeve perversely refuses to do, and that the act which is done by the Deputy must be considered to be the act of the council, precisely to the same extent as if it had been done by the Reeve. It does not, as it appears to us, lie in the power of any Reeve by refusing to do his duty to obstruct the regular pro-

ceedings of his colleagues in council, and then move against their proceedings on account of their not bearing his name, which he has refused to attach to them."

See 1 Dillon on Munic. Corp., §§ 208-230; *Rex v. Buller*, 8 East, 389; *Willcocks on Corp.*, §§ 108-114; *Ex parte Humphrey*, 100 Wend., 612; *Whiteside v. People*, 26 Wend., 634, reversing 23 Wend., 9; *People v. Walker*, 23 Barb., 304; *People v. Batchelor*, 28 Barb., 310, 22 N.Y., 128; *Canniff v. Mayor*, 4 E.D. Smith, 430; *Sudbury v. Stearns*, 21 Pick., 148; *Sargent v. Webster*, 13 Metc., 497; *Stebbins v. Merritt*, 10 Cush., 27.

If an officer whose duty it is to act be not present, or refuses to act, the

assembly may choose one *pro tem* to act in his place.

In an emergency and contingency in which the forms of procedure prescribed by the charter in respect to elections, fails to accomplish the purposes contemplated, so that the necessary offices are vacated, it is competent for the corporators themselves to exercise the power of election, and provide for the selection of a presiding or other necessary officer: *Matter of Wheeler*, 2 Abb. Pr., N.S., 361.

This case was reversed on appeal (1 Chy. Div., 13, *post*, p.). The foregoing opinion and note, on some points not affected by the reversal, it was thought best to publish.

[Law Reports, 20 Equity Cases, 397.]

V.C.M., June 29, 1875.

GRAHAM V. MCCULLOCH.

[1867 G. 171.]

Partnership—Decree for Dissolution—Purchase of Business by one Partner—Possession under the Order of the Court—Order and Disposition—Consent of the true Owner.

By the decree in a suit a partnership between the plaintiff and defendant was dissolved, and the business and partnership property were ordered to be sold as a going concern, either party being at liberty to bid. Under a subsequent order the plaintiff became the purchaser, he having in the meantime been carrying on the business for the benefit of the purchaser. Under the order approving of the purchase by him he was allowed to go into possession at once as purchaser. He continued in possession for some time, and ultimately became bankrupt:

Held, that under the circumstances the business and partnership property were in the order and disposition of the bankrupt with the consent of the true owner.

THIS was a summons to vary the Chief Clerk's certificate.

The bill, which was filed on the 27th of November, 1867, was for the dissolution of a partnership formerly existing between the plaintiff Graham and defendant McCulloch in the business of a druggist, seedsman, and herbalist, carried on at Covent Garden, and a decree was made on the 12th of December, 1867, dissolving the partnership as from the 27th of November, 1867, and ordering, amongst other things, that the business, stock-in-trade, and other property and effects belonging to the partnership, and the good-will thereof, should be sold as a going concern, and giving the plaintiff and defendant liberty to bid at the sale. Graham was in possession.

*By an order of the court, dated the 23d of July, [398 1868, made in Chambers, an offer of McCulloch to purchase the business, stock-in-trade, and other property and effects

belonging to the partnership for £4,300 was accepted, and it was ordered that the defendant should, on or before the 8th of August, 1868, pay into court to the credit of the cause £430 as a deposit, and should pay the residue of the purchase-money into court on or before the 21st of August, and that upon these payments being made the defendant should be let into possession of the stock-in-trade, property, and effects of the business, and all securities in the possession of the receiver for any outstanding personal estate, and he was ordered also to pay into court interest on the £4,300 at 5 per cent. till payment of the capital to be invested and accumulated.

McCulloch made default in payment of the purchase-money, and Graham continued in possession of the stock-in-trade and effects of the partnership. By an order of the 21st of November, 1868, it was ordered that, notwithstanding the previous order, the business, stock-in-trade, and effects of the partnership, and the good-will, should be re-sold as a going concern, and that either party should have liberty to bid at the sale, and the purchase-money was to be paid into court to the credit of the cause.

By an order of the 16th of March, 1869, an offer by the plaintiff Graham to buy the business for £3,000 was accepted, and he was ordered to pay interest on the purchase-money at 5 per cent. till payment of the principal, and was to be entitled to the gains and profits, and to the possession of the stock-in-trade and the partnership property as from the date of the order.

McCulloch became bankrupt on the 5th of November, 1869, and the suit was revived against his assignee.

Graham continued in possession, but paid no part of the purchase-money of the business, or any interest thereon. He continued in possession till the 29th of November, 1872, when he filed a petition for liquidation, upon which petition J. J. Saffery was appointed his trustee in bankruptcy, and by an order of the 3d of April, 1873, it was ordered that Saffery should be at liberty to sell the business to Sidney George Hart, who was the receiver in the cause, A. H. Macdonald, and McCulloch, for £3,500, to be paid in instalments.

399] *Under subsequent orders, sums of £1,048 15s. 2d., and £682 6s., and £200 4s. 3d., representing portions of the purchase-money, were paid into court to the credit of the cause.

These facts appeared from the Chief Clerk's certificate, which was dated the 19th of January, 1875, and he also

found that the above-mentioned sums of money formed part of the partnership assets.

The point raised by the summons was that the business and partnership effects were in the order and disposition of Graham at the date of his bankruptcy with the consent of the true owner, and consequently that the purchase-money of £3,500 belonged to his estate, the partnership being entitled to prove in the bankruptcy for the £3,000 purchase-money agreed to be paid by him, with interest at 5 per cent.

Mr. *J. Pearson*, Q.C., and Mr. *Horton Smith*, for the trustee in bankruptcy: At the time of the plaintiff's bankruptcy the court was the true owner of the business and partnership assets, and he was put into possession of them under the order of the court. They were therefore in the order and disposition of the bankrupt with the consent of the true owner. On the bankruptcy taking place the title passed to the bankruptcy trustee, and the purchase-money now in court belongs to the estate, and must be divided amongst the creditors: *Ex parte Assignees of Brewster and West* (*).

Mr. *Glasse*, Q.C., and Mr. *F. A. Lewin*, for the present plaintiff in the suit: This is not a case of actual assignment. By the decree there was a direction to sell the partnership as a going concern, and till sale Graham remained in possession for the benefit of the partnership. All that the order of the 16th of March, 1869, did was to continue him in possession. The court never parted with the control, and might have resumed possession at any moment. The only difference was that, instead of accounting for the profits, he would have to pay 5 per cent. on the capital. There was nothing like entry by him into possession with the consent of the true owner, as would be necessary [400] to put the property in the order and disposition of the bankrupt. If there had been an assignment, the case would have been brought within *Ex parte Assignees of Brewster and West* (*); as it is, the case is exactly like *Reynolds v. Bowley* (*), in which one partner had allowed the other *bona fide* to carry on the business ostensibly as his own, and it was held that, on the active partner becoming bankrupt, the business was not in the order and disposition of the bankrupt with the consent of the true owner. *Ex parte Cooper* (*) shows that where there is no actual assignment of the partnership property there is no reputed ownership. It was necessary, in order to effect a sale of the business as a going concern, that some one should be in possession, and

(*) 22 L. J. (Bkcy.), 62. (*) Law Rep., 2 Q. B., 41, 474. (*) 1 M. D. & D., 358.

there was simply left there the person who was known as having been the active manager for the partnership. There was no holding out to the public that there had been any change of ownership.

Mr. Pearson, in reply.

SIR R. MALINS, V.C., after referring to the facts, continued :

I think there cannot be a doubt that the effect of the order of the 19th of March, 1869, was to put Graham in possession as sole owner as absolutely as could be done by any assignment, and that I am bound to treat him as such from that time.

Now, it is said on one side that the business belonged to the partnership at the date of the bankruptcy, and was not in the order and disposition of the bankrupt with the consent of the true owner, because the true owner was the court, and the court never intended to part with the control. In my opinion, this contention is entirely unsustainable, and every principle of the rule as to order and disposition applies to the present case, and it would be monstrous to say that the Court of Chancery had not parted with the control over the partnership property. I was surprised when I heard such a proposition.

I think that all the cases cited in opposition to *Ex parte Assignees of Brewster and West* proceed on the ground 401] that there *was a joint ownership still subsisting in the partnership property. In that case two persons who had carried on business in partnership dissolved the partnership, and gave notice of the dissolution in the Gazette, and by a circular to the debtors required the debts to be paid to one of the firm ; and by the deed of dissolution the plant and other partnership effects were assigned to the same partner, and it was stipulated that he should pay the partnership debts, and pay to the other the value of his share of the plant and other effects. This partner became bankrupt without having paid the price of the other partner's share in the partnership effects, and it was held that, while the debts remained the property of the firm, the plant and effects were in the order and disposition of the bankrupt with the consent of the true owner and passed to the assignees. The Lord Justice Turner, in giving judgment, after referring to the recital of the facts in the deed of dissolution, says (1) : "That recital is, to my mind, convincing evidence that these parties had come to an agreement that Brewster should be sole owner of the property." So that

(1) 22 L. J. (Bkcy.), 64.

it is clear that the decision turned upon the principle that the parties had terminated the joint ownership.

The first in order of date of the cases cited in opposition was *Ex parte Cooper* (1). There two persons agreed to dissolve partnership by a particular day, and to publish a notice to that effect in the Gazette, stating that the debts due to the firm would be received and paid by one of them. He remained in possession of the partnership effects, but there was no assignment of them to him, and he continued to carry on the business for four months, when he became bankrupt, and it was held that the partnership property was not converted, but remained the joint property of both the partners. Accordingly the Court of Bankruptcy decided that the joint ownership continued. Sir John Cross, in giving judgment, said (2): "There is no question in this case but that the effects, which were joint property at the time of the dissolution, continued to be the joint property, as between the parties, up to the time of the bankruptcy; for it is not pretended that the retiring partner assigned the effects to the continuing partner; on the *contrary, [402 it is admitted that there was no assignment or agreement to assign; and in the instrument of dissolution it is stipulated that the effects were left in the possession of Johnston to pay the debts of the partnership." The decision therefore turned on the fact that the joint ownership continued.

Then the other case cited was *Reynolds v. Bowley* (3). That was a question whether the fact of one of two partners being a dormant partner entitled the assignees of the active partner on his becoming bankrupt to the entire effects of the partnership, and it was decided in the Exchequer Chamber, reversing the decision of the court below, that the partnership assets were not in the order and disposition of the bankrupt with the consent of the true owner. The judgment, which was very long, was based on the principle that the joint ownership never ceased.

In the present case there was a dissolution of partnership. Then the business and partnership effects were sold to Graham, and although there was no assignment, they became his property, because there was the order of the court putting him in possession, and although there was power in the court to resume possession, and the court might have exercised the power before the bankruptcy, and in that case there would have been no case of order and disposition; yet since the court had not done so, the business and effects remained in the order and disposition of the bankrupt, and

(1) 1 M. D. & D., 358. (2) 1 M. D. & D., 363. (3) Law Rep., 2 Q. B., 41, 474.

passed to the trustee under the bankruptcy. I think, however, that each party ought to bear his own costs. The trustee will take the fund in court and pay his own costs out of it.

Solicitors: Messrs. *Stocken & Jupp*; Messrs. *Lewin & Co.*

[Law Reports, 20 Equity Cases, 410.]

V.C.M., July 7, 1875.

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*FIELDEN V. ASHWORTH.

[1874 F. 60.]

Construction of Will—Distribution among Relatives—Statute of Distributions.

Gift of residue to be distributed "to my relatives, share and share alike, as the law directs."

Held, to mean a distribution under the Statute of Distributions, *per stirpes* and not *per capita*.

JAMES HODGSON, by his will dated in June, 1862, gave and bequeathed "the whole of my property, wheresoever situated, to my executors and trustees of this my will on trust, and I request them to pay all my just debts and funeral expenses, and then distribute the residue to my relatives, share and share alike, as the law directs."

A question was now raised upon further consideration whether under this will the distribution of the property was to be among all the testator's relatives in equal shares, or whether it was to be in such proportions among the relatives of different degrees, as directed by the Statute of Distributions.

Mr. *Freeman*, for the trustees and executors, submitted the question to the court, and stated that if the estate went according to the Statute of Distributions it would be divided into four shares, but if it went equally to each of the relatives it must be divided into eleven shares.

Mr. *Stallard*, in support of a distribution *per capita*: The principle which should govern the construction of these 411] *words is well laid down in Jarman on Wills ('), where it is stated, "A gift to relations is regulated by the Statute of Distributions only so far as regards the ascertainment of the objects of the gift. The statute does not determine the proportions in which they take, consequently the property is distributed *per capita*, or equally among the several individual objects of every degree, not *per stirpes*, or proportionally among the stocks. A contrary proposition has

(¹) 3d ed., vol. ii., p. 109.

indeed been advanced, chiefly on the authority of *Pope v. Whitcombe* ⁽¹⁾, which, however, it is now discovered decides no such point: Sugden on Powers ⁽²⁾. The objects once ascertained take *per capita*."

It was so held in *Thomas v. Hole* ⁽³⁾, where there was a gift of £500 to relations, to be equally divided between them. There it was confined to such as would take by the Statute of Distributions, but their shares were to be divided *per capita*. The same rule prevailed in *Richardson v. Richardson* ⁽⁴⁾. The words "unto and amongst" are equivalent to share and share alike; therefore if this gift had been to relatives according to the statute, share and share alike, it would have been precisely the same as *Richardson v. Richardson*. The principle is not altered by the addition of "as the law directs," which can only mean "to my relatives as the law directs by the statute, share and share alike." The distribution should, therefore, be amongst all the relatives within the statute, to be divided *per capita*.

Mr. *Everitt*, in support of the opposite view, was not called upon, but cited *Booth v. Vicars* ⁽⁵⁾, where the testator gave the residue of personal estate, after the death of A. and B., to be divided to and amongst the respective next legal representatives of A. and B., share and share alike, and it was held that the next of kin of A. and B., according to the statute, were entitled *per stirpes*.

SIR R. MALINS, V.C.: The question turns upon these few words, "to distribute the residue to my relatives, share and share alike, as the law directs." *If it had been [412 merely a gift to the relatives, share and share alike, then the relatives would have included only those under the statute—a class easily ascertained—and it would have made them take *per capita* and not *per stirpes*; but he adds, "as the law directs." What does he mean by this? Does he mean that the relatives are to take share and share alike, or does he mean them to take as the law directs under the Statute of Distributions? I think the intention of the testator was that, not having made up his mind how to divide his property, and probably not knowing exactly how it would go under the Statute of Distributions, he thought it better to leave it entirely to the law, having confidence that it would then be divided in the most proper manner. The only mode of effecting this object is to disregard the words

⁽¹⁾ 3 Mer., 689.

⁽⁴⁾ 14 Sim., 526.

⁽²⁾ 7th ed., vol. ii., pp. 246, 605.

⁽⁵⁾ 1 Coll., 6.

⁽³⁾ Cas. t. Tal., 251.

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“share and share alike,” and direct the property to be divided as the law directs—that is, according to the Statute of Distributions.

Solicitors for all parties: Messrs. *Hughes & Beadles*.

[Law Reports, 20 Equity Cases, 412.]

V.C.M., July 7, 1875.

BEER V. LONDON AND PARIS HOTEL COMPANY.

[1875 B. 196.]

Contract for Sale—Specific Performance—Company—Secretary—Authorized Agent—Statute of Frauds—Auctioneer.

An agreement to sell property to the plaintiff was signed for a company by the secretary, who was alleged to be their authorized agent. The agreement was made subject to conditions of sale, and it was alleged that the vendors therein described referred to the company. The conveyance was prepared for execution when the company was ordered to be wound up, and the liquidator repudiated the contract on the ground that the secretary was not an authorized agent for the purpose of sale:

Held, on demurrer, that the allegations in the bill were sufficient to show that the secretary was the authorized agent for the purpose of executing the contract, both within the Statute of Frauds and the Companies Act, 1867.

Seem, that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the Statute of Frauds.

DEMURRER. The bill, which was filed by Julius Beer, 413] stated as follows: *The London and Paris Hotel Company was incorporated on the 29th of May, 1863. Their objects, as declared by the memorandum of association, were, amongst other things, “the purchasing, selling, or otherwise dealing with hotels, houses, and landed or other property, and any part of the same respectively.” In the year 1874 the company were owners of certain leasehold premises, No. 54 St. James Street, which were held under a lease expiring in September, 1889, at a reserved rent of £375 per annum, and No. 9 Bennett Street, which was held under lease, expiring at Lady Day, 1886, at a reserved rent of £420 per annum, with the benefit of a portion of No. 8 which was used as a back staircase, and upon which £100 per annum was paid, the whole being subject to an underlease for an unexpired term of six years from the first of April, 1874. The rent reserved in this underlease was £1,500 per annum. In April, 1874, the company were desirous of selling their interest in these premises, and the property was offered for sale by auction on the 16th of April, 1874, but no bid was made, and the property remained unsold.

On the 14th of July, 1874, Mr. Charles John Phipps, as

agent for the plaintiff, called on Dr. Reed, the chairman of the company, in order to arrange for the purchase of the premises by private contract. Dr. Reed not being at home, Mr. Phipps wrote to him the following letter :

"I called on you this afternoon respecting the properties leased by the company, of which you are chairman. I understand you wish to part with your fifteen years' lease. If so, I shall be happy to give you £2,000 for all the interests the company have in these two premises. I have written to Mr. Baker, and should be glad to hear from you on Friday."

The Mr. Baker referred to in the above letter was the secretary of the company, and the following letter was sent to him by Mr. Phipps on the 14th of July, 1874 :

"Will you ascertain for me the exact price at which your company will sell their interest under the two leases of No. 54 St. James's Street, and 9 Bennett Street? I have called upon Dr. Reed, but he was out. Perhaps you could call a meeting and let me know what time you will see me [414 either Friday or Saturday. To show you that I am not asking for mere curiosity, I beg to offer you £2,000 for all the interests of the company."

On the 17th of July, 1874, Mr. Phipps, as such agent as aforesaid, saw Messrs. Combe & Wainwright, the company's solicitors, on the subject of the proposed purchase, and was informed by them that, as the fact was, the company would sell the premises for the sum of £2,500. In truth, the directors of the company had on its behalf, and in exercise of the powers conferred on them by the articles of association, determined to accept that sum, and their determination was expressed in a resolution entered on the minutes of the board.

On the same day Mr. Phipps, on the plaintiff's behalf, wrote to Messrs. Combe & Wainwright a letter dated the 17th of July, 1874, of which, omitting formal parts, the following is a copy :

"Referring to our conversation to-day relative to the leaseholds of the premises No. 9 Bennett Street, and No. 54 St. James's Street, now held by the London and Paris Hotel Company, being the property put up for sale by Mr. Marsh on April 16th, 1874, I beg to say that my clients, the freeholders of Crockford's, accept your offer to sell the same for the sum of £2,500, and they will become purchasers at that price. Kindly send me a letter by return to ratify the above, when I will instruct our solicitors to accept the abstract of title from you."

On the 18th of July, 1874, Messrs. Combe & Wainwright, on behalf of the company, sent to Mr. Phipps an agreement to be signed by him on behalf of the plaintiff. This agreement was partly printed on and partly written on the back of the "particulars and conditions of sale" which had been prepared for the aforesaid attempted sale by auction, such "particulars and conditions of sale" and agreement constituting one entire document. This document set out the interest of the vendors in the before-mentioned premises, and it provided for the delivery by the vendors of the abstract of title, including an agreement made between Lionel Lawson and Julius Beer of the one part, and the London and Paris Hotel Company of the other part, and that no 415] *requisition should be made in respect of that agreement; and this document also contained a statement that the particulars and conditions of sale, and plans, might be obtained of Messrs. Combe & Wainwright, solicitors. The name of the company did not appear.

The bill then stated that the term "vendor," wherever used in the particulars and conditions, was intended to refer to the company, who were, in fact the vendors of the premises. The agreement on the back of the particulars and conditions was in the following terms :

"I, Charles Phipps, hereby acknowledge that I have this day purchased the property mentioned and described in the particulars of sale at or for the sum of £2,500. I hereby agree and bind myself, and my executors and administrators, to complete this my said purchase in accordance with and subject to the foregoing particulars and conditions of sale, so far as such conditions are applicable to a sale by private contract.

"Dated the 19th day of July, 1874."

Mr. Phipps wrote into the said agreement his name and address, and signed his own name thereto. In this he acted, as he had done throughout, to the full knowledge of the company, as the agent of the plaintiff. Mr. Phipps at once forwarded the agreement thus signed to Messrs. Combe & Wainwright on behalf of the company, and they, on the 20th of July, 1874, acknowledged its receipt. On the same day Messrs. Combe & Wainwright wrote to Mr. Phipps stating that they had seen the secretary of the company, and had gone into the matter with him, and he had suggested that a question might arise about the staircase which would require consideration, but as the subject did not appear to the plaintiff so to affect him as to render necessary

any delay in executing the contract, and Messrs. Combe & Wainwright having been informed of this, they handed Mr. Phipps, as the plaintiff's agent, an agreement in the form set out, and also written on the back of the particulars and conditions of sale, and signed on behalf of the company by Mr. Baker, the secretary, who was their authorized agent, the signature being "A. Martin Baker, Secretary—For the London and Paris Hotel Company, Limited."

On the 6th of August, 1874, the abstract of title was forwarded *by Messrs. Combe & Wainwright to Messrs. [416 Freshfields & Williams, the plaintiff's solicitors, for perusal.

It was then found that the property was, together with other property, subject to a mortgage for £3,000 to the Alliance Bank, and arrangements were made with the mortgagees, who consented to join in the assignment.

After some delay occasioned by the company, the title was accepted, and the assignment was prepared and approved, and the Alliance Bank, as well as the company and plaintiff, were ready to execute the same.

On the 12th of January, 1875, the assignment was engrossed and forwarded to Messrs. Combe & Wainwright for execution. But on the 15th of January, 1875, the plaintiff received an intimation through his solicitors from Messrs. Combe & Wainwright that a petition for winding up the company was pending, but that they hoped it would shortly be dismissed. The completion of the purchase was, therefore, postponed pending the hearing of the petition.

On the 12th of March, 1875, an order was made that the company be wound up by the court under the provisions of the Companies Acts, 1862 and 1867, and on the 24th of March, 1875, an order was made appointing Frederick Maynard the official liquidator of the company.

As soon as the plaintiff was aware of Mr. Maynard's appointment he applied to him, through Messrs. Freshfields & Williams, on the subject of his purchase.

A correspondence on the subject ensued between Messrs. Freshfields & Williams and Messrs. Davidson & Co., who acted as the official liquidator's solicitors, and in the result Mr. Maynard repudiated the plaintiff's contract.

The contract was in all respects fair and reasonable, and not only was it expressly approved as aforesaid, but the price agreed to be given by the plaintiff, viz., £2,500, was that fixed as the reserve price on the sale by auction.

Mr. Maynard had refused to complete the purchase made by the plaintiff, and threatened and intended, unless restrained, to sell the said premises, and assign to some per-

son other than the plaintiff, with the view to defeat his rights.

417] *The bill was filed with the leave of the court in the winding-up.

The bill prayed specific performance of the agreement; that the defendants might be restrained from selling and offering for sale the hereditaments and premises comprised in the said agreement, and from assigning the same to any person other than the plaintiff.

A demurrer to the bill was put in by the official liquidator on the ground of want of equity; and further, that it appeared by the bill that neither the agreement nor the contract which was alleged by the bill, and of which the plaintiff by the bill sought to have the benefit, nor any memorandum or note thereof, was ever reduced into writing, or signed or sealed by the defendant company, or any person lawfully authorized thereunto, within the meaning of the Statute of Frauds (29 Car. 2, c. 3).

Mr. *Higgins*, Q.C., and Mr. *Crossley*, for the demurrer: There are no allegations in this bill of a contract for sale which would be binding on the company. The bill avoids setting forth the articles of association of the company. There is no power under the Companies Acts to sell property, unless the sale is ratified by the company. When there are articles of association, the title must be deduced under them. The secretary, Baker, could have no power to execute a contract for sale unless he had express authority given to him by the company to do this particular act. The bill alleges that the secretary was the authorized agent of the company, but it does not allege he was authorized in this behalf. In *Cartmell's Case*⁽¹⁾ the directors of a company, who had power to purchase shares in the company, appointed a manager under the power given to them by the articles of association. The manager purchased shares from a shareholder, and a transfer was executed by the shareholder to two directors, who were trustees for the company. The transfer was registered, but it was not executed by the directors. It was there held that the directors had no authority to delegate to a manager the power to buy shares, and that the transfer was invalid.

There is no allegation of a contract such as will satisfy 418] the *requirements of the Statute of Frauds. The words of the statute are, that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the

(1) Law Rep., 9 Ch., 591.

agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This is not a contract signed by the party to be charged therewith, or by any other person thereunto by him lawfully authorized.

The term "vendor" is not of itself a sufficient description of one of the parties to a contract. That was decided in the case of *Potter v. Duffield* (').

It is therefore necessary that the contract should contain the name of the contracting parties, or such a description of them as that the identity cannot be disputed.

That case was discussed in *Commings v. Scott* ('), where the Master of the Rolls said he saw no reason to alter the opinion he had expressed in *Potter v. Duffield*. *Commings v. Scott* was decided upon a question of evidence, as to whether the description given of the vendor was sufficient for the purpose of identity. There is nothing upon the face of this contract, or upon the particulars and conditions of sale, to show who the vendor was; the contract does not, therefore, satisfy the Statute of Frauds.

Mr. Glasse, Q.C., and Mr. Kekewich, in support of the bill: The principal object for which this company was formed was the purchasing, selling, or otherwise dealing with hotels, houses, and landed or other property; therefore when the sale was made it was within the ordinary business of the company. The secretary of a company is authorized to transact the business of the company on their behalf, and he was fully authorized to enter into this contract. But the contract was signed on the printed form at the back of the conditions and particulars of sale, making them part of the contract. The property was put up for sale by the company, and the plaintiff, by his agent, communicated with the chairman of the company, and informed him that he had also written to Mr. Baker, the secretary. He afterwards wrote and *communicated with the [419 solicitors of the company, who were their authorized agents. Then it is alleged in the bill that the vendors, wherever mentioned in the conditions of sale, meant the company. This is admitted by the demurrer, and consequently the company are distinctly made the vendors. It is also alleged that the secretary was the authorized agent; the words of the Statute of Frauds, "thereunto lawfully authorized," are not actually used, but they are distinctly inferred, since there is no other matter alluded to for which he was their

(') Law Rep., 18 Eq., 4.

(*) *Ante*, p. 11.

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lawfully authorized agent except the sale of this property ; and parol evidence may be given to show for whom a person is agent: *Morris v. Wilson* ⁽¹⁾. If this had been a sale by auction, as at first intended, the auctioneer would have been the authorized agent of the vendors to sign the contract, although the name of the vendor was not disclosed. This is a matter occurring in every day's practice, for it is seldom that the name of the vendor is disclosed upon a sale by auction. But the sale took place after the auctioneer had failed to obtain a bidding. This was the case in *Commins v. Scott* ⁽²⁾, where the contract for sale was signed by the agent of the vendor subject to the conditions of sale, which did not disclose the name of the vendor ; but it was held that there was sufficient evidence to show who the vendor was, and the Master of the Rolls was of opinion that there was a good contract, and overruled the demurrer to a bill for specific performance. The word "vendor" is as good a description of one of the contracting parties as the term "executor," which was held sufficient in *Hood v. Lord Barrington* ⁽³⁾, or "proprietor," as in the case of *Sale v. Lambert* ⁽⁴⁾.

There is another ground upon which we say this contract may be enforced. By the 37th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), it is provided that any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company, in writing, signed by any person acting under the express or implied authority of the company. There can be no doubt, upon the facts set out in this bill, that the secretary who signed this contract did so while acting under 420] *the express or implied authority of the company. Under all these circumstances, there is no ground on which the demurrer can be sustained.

Mr. *Higgins*, in reply : The Statute of Frauds requires that an agreement for the sale of lands shall be in writing. This was explained in *Williams v. Lake* ⁽⁵⁾ to mean that the essentials of the agreement must be stated in writing, and amongst them are the names of the contracting parties. Here we have a contract with one of the contracting parties neither named nor described. The same law is laid down in *Williams v. Byrnes* ⁽⁶⁾. As to the Companies Act of 1867,

⁽¹⁾ 5 Jur. (N.S.), 168.

⁽²⁾ *Ante*, p. 11.

⁽³⁾ Law Rep., 6 Eq., 218.

⁽⁴⁾ Law Rep., 18 Eq., 1.

⁽⁵⁾ 2 E. & E., 349.

⁽⁶⁾ 9 Jur. (N.S.), 363.

there is nothing to show that Baker was a person acting under the express or implied authority of the company.

SIR R. MALINS, V.C.: This is a bill filed for the specific performance of a contract to purchase a house in St. James's Street which is the property of the London and Paris Hotel Company, and I ought to be very certain that the plaintiff cannot sustain his case of there being a binding contract before I allow the demurrer to such a bill, because if I allow the demurrer the case is entirely out of court, and the plaintiff loses every opportunity of amending his case and bringing forward materials to show that there is a contract; nor can I say that the transactions mentioned in this bill give me any inclination whatever to allow the demurrer. The allegations in the bill admitted, of course, to be correct by the demurrer are these: "The defendants"—that is, the London and Paris Hotel Company—"were incorporated by registration under the Companies Act, 1862, on the 29th of May, 1863. Their objects, as declared by the memorandum of association, were, amongst other things, the purchasing, selling, or otherwise dealing with hotels, houses, and landed or other property, and any part of the same respectively." In the month of April, 1874, the company, whose business it was to buy and sell houses, and so forth, "were desirous of selling their interest in certain leasehold premises of which they were the owners, and the property was offered for sale by public auction on *the 16th of April, 1874, but no [42] bid was made, and the property remained unsold." Upon that allegation I must say it was the company who were desirous of selling—the company offered their interest for sale; and that, therefore, was done by the express authority of the company. Here is, therefore a company desirous of selling, and they take the usual means of selling, namely, they employ an auctioneer, who puts the property up for sale by public auction. The company showed their desire to sell; and I may add that a subsequent paragraph shows that the reserved bidding fixed at the sale was £2,500. The company, therefore, were not only desirous of selling, but they took the necessary measures to sell, and they fixed the price at which they were willing to sell; and if £2,500 had been bid at the auction, it is perfectly clear that upon the auctioneer, by the authority of the company, knocking down the hammer on a bid, it would have been conclusive on the vendors, as a contract which could have been enforced against them. Then the property not having been sold, but the company still desiring to sell it, "on the 14th of July, 1874, Mr. Charles John Phipps, as agent for and on behalf

of the plaintiff, called on Dr. Reed, the chairman of the company, in order to arrange for the purchase of the said premises by private contract." Dr. Reed was not at home when Mr. Phipps called, and Mr. Phipps the same day wrote him a letter, a copy of which is set out in the bill. The letter to Mr. Baker is also set out, in which he offers the sum of £2,000 for the interest of the company in the premises. Then, "on the 17th of July, 1874, Mr. Phipps, as such agent as aforesaid, saw Messrs. Combe & Wainwright, the company's solicitors, on the subject of the proposed purchase, and was informed by them that the company would sell the premises for the sum of £2,500," which is the very price which the bill states they had fixed as the reserve price at the auction. On the same day Mr. Phipps, on the plaintiff's behalf, wrote to Messrs. Combe & Wainwright a letter dated the 17th day of July, 1874, in which the offer is accepted by Mr. Phipps. Here are the owners of the property desirous of selling it for £2,500; and the proposed purchaser now says, "I will take your own terms. I will become the purchaser at the price you demand for it, 422] namely, £2,500." Then, "on the *18th of July, 1874," Combe & Wainwright, who are the solicitors of the company, and who must be presumed to know something about the interest of the company and their wishes, sent to Mr. Phipps an agreement, to be signed by him on behalf of the plaintiff. Could I suppose that Messrs. Combe & Wainwright would have prepared an agreement to be signed on behalf of the plaintiff unless they knew perfectly well that their employers, the company, were desirous of selling the property? This agreement was partly printed on and partly written on the back of the particulars and conditions of sale which had been prepared for the aforesaid attempted sale by auction, such particulars and conditions of sale and agreement constituting an entire document. This document states the particulars and conditions of sale of the leasehold interest of the vendors in the property, which is fully described; and there are various conditions stated, amongst others the fourth, providing that the vendors should, within seven days, deliver to the purchaser or his solicitor an abstract of title to the property, which was to comprise an agreement made between Lionel Lawson and Julius Beer of the one part, and the London and Paris Hotel Company, Limited, of the other part. Then there is an allegation in this bill, which is admitted by the demurrer to be true, that "the term 'vendors,' wherever used in the said particulars and conditions, is intended to refer to the company, who

were in fact the vendors of the said premises"—that is, the defendants, the London and Paris Hotel Company. Therefore I must read it thus: "made the 1st day of September, 1873, between Lionel Lawson and Julius Beer of the one part, and the London and Paris Hotel Company, Limited, who were the vendors, of the other part." The word "vendors," by the admission, where it is necessary to read it so, meant that the London and Paris Hotel Company were the vendors. The parties having agreed that one would give, and the other accept, £2,500 for the purchase and sale of the property, an agreement was come to to purchase the property in accordance with and subject to the foregoing particulars and conditions of sale, so far as such conditions are applicable to a sale by private contract.

Now, the law is thoroughly well settled, that, in accordance with *the Statute of Frauds, all you want to [423 constitute a binding contract is a memorandum of the terms of the contract, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Mutuality is not necessary. If the vendor signs, he is bound, although the purchaser has not signed anything; and if the purchaser signs, he is bound, although the vendor has not signed anything. In this case there is no doubt whatever that Mr. Phipps, as the agent of the plaintiff, would have been bound by this contract, although the vendors had done nothing to bind themselves. In that state of things "Mr. Phipps wrote into the said agreement his name and address, and signed his own name thereto. In this he acted, as he had done throughout, to the full knowledge of the company, as the agent of the plaintiff." Then "Mr. Phipps at once forwarded the agreement thus filled up and signed to Messrs. Combe & Wainwright on behalf of the company, and they, on the 20th of July, 1874, acknowledged its receipt as follows: "We have received agreement signed by you, and will forward you one signed on behalf of the company before handing over the one signed by you.'" Can anything be more clear? It is a distinct continuance of the desire of the company to sell the property at the price of £2,500. Then, "on the same 20th July Messrs. Combe & Wainwright wrote to the plaintiff a further letter, stating that they had seen the the secretary of the company, and had gone into this matter with him, and he thought they should see Mr. Phipps again upon a question as to the staircase." It is of no consequence what that question was, for the bill states, "On consideration the question of the staircase did not appear

to the plaintiff so to affect him as to render necessary any delay in executing the contract, and Messrs. Combe & Wainwright having been informed of this, handed Mr. Phipps, as his agent, an agreement in the form above set out, and also written on the back of such particulars and conditions of sale as aforesaid, and signed on behalf of the company by Mr. Baker, the secretary, who was their authorized agent." Therefore the allegation in the bill is that a copy of the contract was handed to the plaintiff signed by Mr. Baker, the secretary of the company, who was their 424] authorized *agent. Now, what was he their authorized agent for? What was the kind of negotiation that was going on? What was it they wanted to carry into effect? A contract by which one bought and the other sold this property in St. James's Street. Therefore I am of opinion, when it says it was signed "by Mr. Baker, the secretary, who was their authorized agent," that that means their authorized agent in the only matter referred to in this bill—their authorized agent to sign that contract to bind the company to do that which they were desirous of doing, namely, to sell this property for £2,500. The signature was in the following form: "A. Martin Baker, Secretary—For the London and Paris Hotel Company, Limited," who are admitted by this demurrer to be the vendors of the property. It was therefore a contract unquestionably signed by the plaintiff, that is, signed by his agent lawfully authorized; and here is an allegation of a contract signed by the vendors, or by Mr. Baker, on their behalf, duly authorized; because I must assume he could not be their agent unless he was duly authorized. He is the secretary, and he signs it "for the London and Paris Hotel Company, Limited." Having been perfectly aware that a contract had been signed, they now proceed to carry this contract into effect, and "on the 6th of August, 1874, the abstract of title was forwarded by Messrs. Combe & Wainwright to Messrs. Freshfields & Williams, the plaintiff's solicitors, for perusal." Here, again, therefore, the vendors, having intended to sell, having, in the manner I have pointed out, bound themselves to sell, proceed to carry the contract into effect, doing the very first act necessary, namely, delivering an abstract of title by the duly authorized solicitors of the company, who by this demurrer are admitted to be so, and acting in that and in no other capacity. A difficulty was then raised as to a mortgage for £3,000, to which the property was subject, to the Alliance Bank, and arrangements were made with the mortgagees, who consented to join in

the assignment. After some delay occasioned by the company, the title was accepted, and the assignment was prepared and approved, and the Alliance Bank, as well as the company and the plaintiff, was ready to execute the same. On the 12th of January, 1875, the assignment was engrossed and forwarded to Messrs. *Combe & Wainwright for [425 execution. But on the 15th of January, 1875, the plaintiff received an intimation through his solicitors from Messrs. Combe & Wainwright that a petition for winding up the company was pending, but they hoped that it would shortly be dismissed. Then everything was ready for completion, the assignment was engrossed, and on the 12th of March I made an order to wind up the company. If there were a valid and subsisting contract when the order to wind up was made, that order could not in any way have interfered with such a contract; and, upon the allegation of the bill, I am bound to assume, as the parties desired to sell, so they had sold, and by their duly authorized agent had signed a contract for sale, which, for the present purpose, I must assume to be binding upon them. Then it is alleged, which is not unimportant, "the contract was in all respects fair and reasonable, and not only was it expressly approved as aforesaid, but the price agreed to be given by the plaintiff, viz., £2,500, was that fixed as the reserve price on the sale by auction." The contract, therefore, according to the allegations of this bill, was deliberately entered into, by which, upon the allegations of the bill, the full and fair price demanded for the property was given by the purchaser, and I cannot say that I think the official liquidator has exercised a sound discretion by in any way entering into litigation upon this subject; and if the matter had been brought before me personally, I certainly should not have allowed him to do so, thereby wasting the assets of the company and wasting the time of the court. All I can say is, that upon the allegations of the bill, if I had much more doubt than I have, it is not a case in which I should have allowed the demurrer. When a bill is brought for specific performance of a contract as to a thing of so much importance as this is, if there were any doubt as to whether the purchaser can or cannot make out his title to the contract he ought to be allowed to endeavor to do so by going into evidence and amending his bill if he can, and I should do very wrong if I allowed the demurrer, which would at once put an end to the chance of the plaintiff showing by evidence his title in this suit. If the defendants can show that there has been any want of compliance with the requi-

426] sitions of the Companies Act, or *anything of that kind, that will be perfectly open to them upon their answer, and upon evidence to be gone into.

Now, it is said that this contract was not signed in such a manner as to bind the company. I think that is answered by referring to the 37th section, sub-sect. 2, of the act of 1867, which provides: "Any contract which if made between private persons would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company." Supposing this company, while it was a going company, put this property up, as it did, for auction, on the 14th of April last, and supposing the auctioneer signed "For the London and Paris Hotel Company, Limited," could it have been gravely argued that, the London and Paris Hotel Company having ordered this property to be sold by auction, having employed an auctioneer, who thereby becomes their agent, and who in the usual course of business signs for the London and Paris Hotel Company, that would not be a valid contract? It would clearly be so by this section, because it would be made by a person acting under their express or implied authority; and although the authority may not be express, it is an implied authority to the auctioneer to sign the contract on behalf of the vendor, or owner of the property which is sold by auction.

A point has been gone into which I think it is not necessary to give any decision upon. It is not called for by this case; but as the question has been raised before me, I think it right to say that I entertain no doubt whatever, if property, according to usage, is put up to be sold by auction, and, according to usage, the particulars of sale are perfectly silent as to who is the owner or proprietor of the estate, and the property is put up by the auctioneer and sold, and the contract is signed by the auctioneer on behalf of the owner or proprietor, that every such contract is a good contract; and I think it is of the greatest importance that the public should be under no misapprehension whatever as to the validity of contracts entered into under such circumstances. I do not believe that there is one sale in a hundred in which the name of the owner or proprietor is 427] *mentioned in the particulars of sale. It is, "The auctioneers are instructed by the proprietor or owner to offer the property for sale;" and when it has been sold by auction, the auctioneer sells it on behalf of the proprietor, and he may put the name more particularly afterwards.

He puts the property up to auction as sold on behalf of the proprietor, and it is sufficient if the proprietor's name is disclosed, in case of a dispute arising between the parties, when a bill is filed for specific performance.

Upon all these grounds I am of opinion that this demurrer must be overruled.

Solicitors for the bill: Messrs. *Freshfields & Williams*.

Solicitors for the official liquidator: Messrs. *Carr, Banister, Davidson & Morriss*.

See 12 Eng. Rep., 572.

The signature of an auctioneer to the terms of sale containing the necessary statements of the terms of a sale made by such auctioneer, *at the time of sale*, is sufficient, under the statute of frauds, to bind the seller and the purchaser: *Tallmad v. Franklin*, 14 N. Y., 584; *Butler v. Thompson*, 92 U. S. Rep., 412; *First Baptist Church v. Bigelow*, 16 Wend., 28; *Whart. on Agency*, § 655 *et seq.*, *Browne on Stat. Frauds*, § 369; *Coles v. Browne*, 10 Paige, 526; *Bleecker v. Franklin*, 2 E. D. Smith, 93.

Otherwise, if not made till after the time of sale: *Hicks v. Whitmore*, 12 Wend., 548; *Goelet v. Cowdry*, 1 Duer, 132.

A memorandum by the clerk of the auctioneer not present at the sale is insufficient: *McQuade v. Warren*, 12 N. Y. Leg. Obs., 250.

Otherwise, if he were present at the sale and then made the memorandum: *Clarkson v. Noble*, 2 Upper Can. Q. B., 361; *Bird v. Boulter*, 1 Nev. & Man., 313; *Crooks v. Davis*, 6 Grant's (U.C.) Chy., 317; *Price v. Dusin*, 56 Barb., 647; *Browne on Stat. Frauds*, § 369.

But an entry by the auctioneer or his clerk without signature will be insufficient: *Thomas v. Ross*, 19 U. C. Q. B., 370; *Bailey v. Ogden*, 3 Johns., 399.

A mere entry of the terms of sale by the clerk of an auctioneer, though assented to by the purchaser, is not suffi-

cient: *Johnson v. Mulry*, 4 Rob., 401. See *Browne on Stat. Frauds*, § 369.

When the auctioneer is one of the parties to the sale, his memorandum of the terms of sale will not bind the other: *Wingate v. Herschauer*, 42 Iowa, 506; *Bent v. Cobb*, 9 Gray, 397.

But see *Browne on Statute Frauds*, § 369.

Where a broker entered the terms of sale in the presence of both parties: held he was the agent of both parties to sign such terms of sale: *Durrell v. Evans*, 1 Hurl. & Colt., 174; *Crooks v. Davis*, 6 Grant's (U.C.) Chy., 317; *Bro. on Statute of Frauds*, §§ 353, 353 a., 369; *Sale v. Darragh*, 2 Hilt., 184.

Upon a judicial sale by a master or referee, his signature to a memorandum of the terms of sale is sufficient to bind the purchaser: *Hegeman v. Johnson*, 35 Barb., 200; *Bicknell v. Byrnes*, 23 How., 486; *Willets v. Van Alst*, 26 How., 325; *McComb v. Wright*, 4 Johns. Chy., 659; *Nat. Ins. Co. v. Loomis*, 11 Paige, 431; *Browne on Statute Frauds*, § 369.

But see *Wiltham v. Smith*, 5 Grant's (U.C.) Chy., 203; *Mingay v. Corbett*, 14 U. C. Com. Pl., 557; *Whart. on Agency*, § 655 *et seq.*; *Wingate v. Herschauer*, 42 Iowa, 506.

As to signature by a sheriff, see *Flintoff v. Elmore*, 18 Upper Can. Com. Pl., 274; *Clarkson v. Noble*, 2 U. C. Q. B., 361.

[Law Reports, 20 Equity Cases, 428.]

V.C.B., Dec. 17, 19, 20, 1878; June 1, 1875.

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*YARDLEY v. HOLLAND.

[1869 Y. 12.]

Old Will—Devise by Mortgagee of Mortgage and Trust Estates—Subsequent Contract by Testator for Purchase of the Equity of Redemption—Revocation of Devise—Descent—Claim of Heir barred by lapse of Time—Statute of Limitations (3 & 4 Will. 4, c. 27), ss. 2, 17, 25.

T. W., in 1824, became mortgagee in fee of Blackacre. The form of the conveyance was to him on trust to sell, and out of the proceeds to retain the debt, and pay the surplus, if any, to the mortgagor. In February, 1826, T. W. made his will, whereby he devised all his real estate (except mortgage and trust estates) and all his personal estate to trustees, upon trust for Y. and H. He also devised to the same trustees all his mortgage estates upon trust, on payment of the moneys due, to convey the same to the person who should be entitled to the equity of redemption; and directed the moneys to form part of his personal estate.* In March, 1826, the mortgagor of Blackacre became bankrupt; and in June, 1826, T. W. contracted with the assignees in bankruptcy for the purchase of the equity of redemption. The purchase-money was paid by T. W., but no conveyance from the assignees was ever executed. In October, 1826, T. W. died, leaving Y. and C. his co-heirs. C. by deed renounced to the trustees of the will all claim under the contract of June, 1826. The trustees under the will entered into receipt of the rents of Blackacre, and administered the same as part of the testator's estate until 1869.

Y. then claimed the right to a conveyance of one moiety of Blackacre as co-heir of T. W. :

Held, that the purchase of the equity of redemption by the testator revoked the devise by his will, not only of the beneficial interest but of the legal estate in the mortgaged property; that no dry legal estate in Blackacre was remaining in the trustees of the will at the testator's death; that the mortgage estate had by the contract ceased to be a mortgage, and had become a new absolute interest; and that Blackacre was undisposed of by the will :

Held, further, that the claim of Y., as co-heir, against the trustees had become barred by the Statute of Limitations.

MOTION for decree.

By indentures of lease and release, dated the 29th and 30th of March, 1824, a freehold estate called the Bencliffe estate, in the parish of Eccles, Lancashire, was conveyed by way of mortgage to secure the repayment to Thomas Watkins, his executors, administrators, and assigns, of a sum [429] of £9,000 and interest. The form of *the conveyance was, to Thomas Watkins, his heirs and assigns, upon trust that he, or they, on his or their own proper authority, and without any consent or concurrence of the mortgagor, David Bentley, his heirs or assigns, should at any time thereafter sell the estate, and out of the proceeds retain the mortgage debt and pay the surplus, if any, to David Bentley, his executors, administrators, or assigns; and Thomas Watkins covenanted that he would not sell without giving Bentley, his heirs or assigns, six months' notice.

By another indenture, dated the 30th of September, 1824, the same hereditaments were further charged with the repayment to Thomas Watkins, his executors, administrators, and assigns, of the sum of £1,000 and interest.

In May, 1825, Thomas Watkins gave notice to the mortgagor of his intention to sell under the deed; but no sale took place.

Thomas Watkins, on the 3d of February, 1826, made his will, whereby he devised all his lands, tenements, and hereditaments in Great Britain, "except mortgage and trust estates," to three trustees (whom he also appointed executors), their heirs, executors, administrators, and assigns, upon trust to sell and dispose of the proceeds as was thereinafter declared of his personal estate. He then gave and devised to the same trustees all and every the hereditaments whatsoever whereof he was seised as mortgagee for any estate of freehold, or in trust for any person or persons whomsoever, and all his estate and interest therein, upon trust, on payment to them of such moneys as should be due in respect of the same premises so in mortgage, to convey the hereditaments of which he was so seised as mortgagee to the use of the several persons who, at the time of making such payment, should be entitled to the equity of redemption in the said mortgaged premises; but he directed that the moneys which should be so received should be applied for the purposes by his will directed concerning his personal estate. After giving various legacies he gave and bequeathed the residue of his personal estate and effects and the moneys to arise from the sales thereinbefore directed to be made of his real estate, to the same three trustees, their executors, administrators, and assigns, upon trust that they should invest, and stand possessed of one-third of the same for the benefit of testator's nephew, Thomas Watkins Yardley, for life, and after his death for *his issue as [430 therein mentioned; and should stand possessed of the remaining two-thirds of the same, upon like trusts, for the benefit of his nephews, John Yardley and George Watkins Yardley, for their respective lives, and after their respective deaths, for their issue respectively; and if either of the three nephews should die, not having had a child who should attain twenty-one, or die under that age leaving issue, the part or share of such nephew was to fall into the residue of the personal estate.

In March, 1826, David Bentley with his then partner, James Fogg, became bankrupt; and by a memorandum or agreement in writing, dated the 6th of June, 1826, the par-

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ties thereto of the first part, being the assignees in bankruptcy, claiming to be entitled to the equity of redemption in the Bencliffe estate, for their heirs, executors, and administrators, agreed with Thomas Watkins, his heirs, executors, administrators, and assigns, that they, their heirs, executors, and administrators, would at any time thereafter, at the request and costs of Thomas Watkins, his heirs or assigns, release to him, his heirs or assigns, all the right or equity of redemption, if any, which they, or such assignees as aforesaid, had or claimed to have in the Bencliffe estate; and in consideration thereof Thomas Watkins thereby undertook to pay to the parties of the first part the sum of £200 as the purchase-money of the said equity of redemption.

The sum of £200 was paid by the testator, who between May and August, 1826, entered into possession of the Bencliffe estate, all but the mansion house and grounds; and continued in such possession until his death.

No legal conveyance of the equity of redemption was ever made by the assignees in bankruptcy to Thomas Watkins, his heirs or assigns; and it did not appear that any conveyance by enrolled bargain and sale was ever made by the Commissioners in Bankruptcy to the assignees, as required by the 6 Geo. 4, c. 16, the statute then in force.

On the 4th of October, 1826, Thomas Watkins, the testator, died, leaving his sister Sarah Court, widow, and his nephew Thomas Watkins Yardley, his co-heirs at law.

After the testator's death, the trustees of the will paid a further sum of £315 to David Bentley, who, it appeared 431] from the evidence, *had until then retained possession of the mansion in satisfaction of some demand which he made, as he stated, "for my services and expenses at Bencliffe and Manchester," and who thereupon gave up the entire possession to the trustees, and it was not disputed that ever since May, 1827, the trustees of the will had continued in uninterrupted possession of the Bencliffe estate, and that they had dealt with and administered the rents and profits of it according to the trusts of the will.

By an indenture dated the 31st of December, 1827, and expressed to be made between Sarah Court, described as "only sister and heiress-at-law" of Thomas Watkins, of the one part, and the then trustees of the will of the other part, after reciting the above mortgage and further charge, the will, the agreement for purchase, and the death of the testator, that no conveyance of the equity of redemption had been made, "nor has the said agreement in any man-

ner been carried into effect so far as regards the equity of redemption of and in the same several hereditaments and premises," and that "doubts and difficulties have arisen respecting the title of" the assignees "to the said equity of redemption . . . and as to their right to make and enter into" the agreement of the 6th of June, 1826, and that "doubts have also arisen as to the effect of the same agreement with respect to the estate and effects of the said Thomas Watkins deceased," and that, in order to remove and do away with such doubts and difficulties, and to obviate the necessity of a suit which the trustees were about to commence against the assignees, it had been agreed "that the same agreement shall be rescinded and entirely done away with as fully and effectually as if the same had never been made or entered into," it was witnessed that in pursuance and performance of the then present agreement, and in consideration of £200 paid by the trustees to Sarah Court, she thereby testified and declared that the agreement of the 6th of June, 1826, should, so far as the same related to her, her heirs, executors, or administrators, be rescinded and thenceforth rendered null and void to all intents and purposes, and she thereby constituted the trustees her attorneys to execute all deeds and other acts necessary for rescinding the same.

In July, 1832, George Watkins Yardley, one of the testator's *nephews, died without issue, and upon that [432 event the shares of the two other nephews, Thomas Watkins Yardley and John Yardley, and their respective issue, in the residuary estate, became moieties instead of thirds.

On the 12th of December, 1834, Mrs. Court died.

On the 9th of December, 1840, Thomas Watkins Yardley died, intestate as to real estate, other than mortgage and trust estates, leaving as his only issue one daughter, his heiress-at-law, Ann Watkins Yardley, who in October, 1863, married William Holland. Previous to her marriage a settlement was executed, by which all her estate and interest under the will of Thomas Watkins were assigned to William Allen, Richard Leigh Holland, and Frederick Richard Marshall, as trustees.

In April, 1867, John Yardley, the other nephew of the testator died, leaving five infant children.

On the 24th of August, 1869, the original bill was filed by the infant children of John Yardley, against Mr. and Mrs. Holland and their trustees, Allen, Holland and Marshall, and the then trustees of the testator's will, praying for administration.

The answer of the trustees of Mr. and Mrs. Holland's settlement, filed in January, 1870, stated that they were in April, 1869, advised to institute inquiries, which resulted in their discovering that the Bencliffe estate was an estate on which the testator had at the date of his will a mortgage only.

On the 9th of September, 1871, the defendant, Ann Watkins Holland, died.

On the 28th of October, 1871, the defendants, William Holland and the trustees of his marriage settlement, filed another (voluntary) answer, in which they submitted that by reason of the purchase in June, 1826, by the testator of the equity of redemption, although there was no conveyance, there was no mortgage existing at the death of the testator, and that the equitable title, and the right to call for the legal title of the Bencliffe estate descended to his co-heirs-at-law. On this ground the trustees of the settlement claimed one moiety of the estate.

They also submitted that the deed of the 31st of December, 1827, operated as a relinquishment by Sarah Court to the trustees, in favor of the beneficiaries under the will, of 433] her moiety in the *estate; and that the title of the beneficiaries had become absolute by lapse of time against Sarah Court and her heirs. On this ground the trustees of the settlement claimed one moiety of the other moiety of the estate.

On the 22d of February, 1872, the bill was finally re-amended, and as thus re-amended was filed by the same plaintiffs against William Holland, his children and his settlement trustees, the present trustees of the will, and the present personal representatives of the testator, stating that difficulties had arisen and were pending with regard to the testator's unsold real estate, and in particular with regard to the Bencliffe estate, as to which claims, adverse to the title under the will, had been set up by the first defendants; but which claims, if they ever had any foundation (which the plaintiffs did not admit), were barred by the possession for upwards of forty years of the trustees of the will, and by the Statute of Limitations; and praying for administration so far as the trusts remained to be preformed, and that the rights and interests of all parties in the unsold real estate, including the Bencliffe estate, might be ascertained and declared.

1873. Dec. 17. Mr. *Kay*, Q.C., and Mr. *Townsend*, for the plaintiffs: From the year 1826 until 1869, when this claim by the defendants was first made, this property has

always been treated as real estate. If it was not real estate, if it was merely property on which the testator advanced money, and got a conveyance to himself as mortgagee, it would then pass as part of his residue. If, on the other hand, it became real estate after the date of the will by reason of his having purchased the equity of redemption, we then say that the right of the heir-at-law has been barred by the statute. How can it be said that the trustees of the will were trustees for the heir? They were trustees only for the mortgagor. From the accounts it appears that this property has always been treated as if it had passed by the will.

By sect. 2 of the Statute of Limitations (3 & 4 Will. 4, c. 27), no land can be recovered but within twenty years after the right of action has accrued; and forty years is by sect. 17 an absolute bar.

*If the devisees of the will were trustees for the heir, [434 at least they were only constructive, not express, trustees; and sect. 25 is excluded. Under the 27th section acquiescence for forty years is a bar against an heir setting up a case even of constructive trust. In this instance the heirs might have claimed the legal estate at the testator's death. The only express trust was to convey to the persons who were entitled to the equity of redemption. At the testator's death no one was entitled to redeem.

Another view is, that the testator himself by this purchase extinguished his equity of redemption, and converted his equitable interest into absolute ownership. He became seised absolutely. The only way by which anything could have passed was by the devise of mortgage and trust estates. But, in truth, nothing passed by that devise. By the purchase of the equity of redemption, the devise of this estate as a mortgage or trust estate was revoked. The purchase of the equity operated as a new purchase of the land: *Brydgis v. Duchess of Chandos* (1); *Rawlins v. Burgis* (2); *Casborne v. Scarfe* (3); *Strode v. Lady Falkland* (4).

Assuming then, as we contend, that nothing with regard to this estate passed by the will, it descended; and as the trustees entered in 1826 and 1827, it is the idlest thing to argue that the right of the heir is not barred. Even if the legal estate under the mortgage deed did pass to the trustees, they held that legal estate as part of the testator's general estate against everybody claiming against the will: *Bur-*

(1) 2 Ves., 417.

(2) 2 V. & B., 382.

(3) 1 Atk., 603; 2 Jac. & W., 194.

(4) 2 Vern., 621; 3 Rep. in Ch., 90.

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roughs v. M Creight⁽¹⁾. Their possession would be adverse to the co-heirs.

Rightly or wrongly, the trustees did, as a fact, treat this as part of the general estate. If their possession was wrongful, it was as adverse to the co-heirs as could be conceived.

An express trust can only arise when it appears on the face of the instrument; not merely the dry legal estate, but the beneficial interest, must appear: *Salter v. Cavanagh*⁽²⁾; *Commissioners of Charitable Donations v. Wybrants*⁽³⁾.

Supposes the testator had expressly devised the equity 435] of *redemption, could there then have been any doubt that the devisee would by this time have been barred?

That a deed in this form is a mortgage within the 28th section, and that even an express trust will be barred if no surplus seems probable, appears from *Locking v. Parker*⁽⁴⁾.

Mr. *Eddis*, Q.C., and Mr. *Bevir*, for the defendants, the present trustees of the will.

Mr. *Amphlett*, Q.C., and Mr. *William Pearson*, for the first defendants, Mr. Holland, his children, and the trustees of his marriage settlement: We claim one moiety of this estate, not under the will, but as heir-at-law of the testator, and we ask, not for a sale, but for a conveyance of this moiety to us.

Further, we say, if any interest in this estate passed by the will, as, for example, Mrs. Court's moiety, to one moiety of that interest we are also entitled.

We do not dispute the validity of the agreement for purchase of the equity of redemption. But we say, when the will was made, the testator was mortgagee in fee; he devised this mortgaged estate upon ordinary trusts, and if nothing more had happened the mortgage-money when realized would have been disposed of according to the general purposes of the will. Then came the agreement for purchase of the equity of redemption. To pass that right no deed was necessary. So far we are agreed. It must be admitted further, that if the equity of redemption had been foreclosed, or had been conveyed by deed, it would have been extinguished, and a perfectly new estate would have been created, which would not have passed by the will.

But here there was no conveyance, only a contract, a thing which a court of law will not look at. Hence there was nothing which operated at law to revoke the devise. All a court of law would find would be a devise of this mortgage estate to trustees. Suppose after a devise of real

(1) 1 J. & Lat., 290.

(3) 2 J. & Lat., 182, 196.

(2) 1 D. & Wal., 668, 681.

(4) Law Rep., 8 Ch., 30.

estate there had come a contract to sell the estate. That would not affect the devise: Jarman on *Wills⁽¹⁾. It [436 follows that the devise of this mortgage estate became a trustee for the heir: *Brydges v. Duchess of Chandos*⁽²⁾; *Rawlins v. Burgis*⁽³⁾. *Casborne v. Scarfe*⁽⁴⁾ involved a legal right, viz., the husband's curtesy: *Strode v. Lady Falkland*⁽⁵⁾; Coote on Mortgages⁽⁶⁾; *Thompson v. Grant*⁽⁷⁾.

But, further, could the agreement with the assignees of the 6th of June, 1826, have been specifically performed? We say it could. The absence of a conveyance by enrolled deed of bargain and sale, which by 6 Geo. 4, c. 16, s. 64, is ordered to be made by the commissioners to the assignees, would not in this court have been an obstacle: *Lloyd v. Lander*⁽⁸⁾.

At the testator's death, therefore, the trustees were seised of a legal estate upon the trusts of the will; under the will there was a devise to these same persons upon the same trusts; which trusts becoming inoperative, there is a resulting trust for the heir-at-law.

As to the express trust, no doubt, if the words of the 25th section be taken as the plaintiffs would read them, we might be held to have been barred. But the case is covered by authority. It is sufficient that on the face of the instrument a trust does appear—that the devisees do not take beneficially. No matter that the declared trust fails, and that an implied trust arises; if a trust appears at all, it is an express trust within the section: *Saller v. Cavanagh*⁽⁹⁾; *Commissioners of Charitable Donations v. Wybrants*⁽¹⁰⁾; Sugden on Real Property Statutes⁽¹¹⁾.

If the devise of mortgage estates had been to a different set of trustees, then, no doubt, the defendants would have been in under a wrongful title. But it is abundantly clear that if there are two titles, and the trustee enters, he will be held to have entered under the right title: *Lister v. Pickford*⁽¹²⁾. We have been in receipt of one moiety of the rents, and therefore to that extent in possession; the trustees cannot now say they paid us by mistake. Claiming *dehors* the will, we have a right to attribute these payments to our rights *dehors* the will.

*No case of election arises here.

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An argument has been advanced about acquiescence; but

(1) 3d ed., p. 67.

(2) 2 Ves., 417.

(3) 2 V. & B., 382.

(4) 1 Atk., 653; 2 Jac. & W., 194.

(5) 2 Vern., 621.

(6) Pages 550, 551.

(7) 4 Madd., 438.

(8) 5 Madd., 282.

(9) 1 D. & Wal., 668.

(10) 2 J. & Lat., 182.

(11) Page 103.

(12) 34 Beav., 576.

there cannot be acquiescence without notice, and this they have not proved: *Mills v. Druitt* ⁽¹⁾.

Mr. *Bury*, for the defendants, the testator's personal representatives.

Mr. *Kay*, in reply, referred to *Ex parte Morgan* ⁽²⁾.

In the course of the reply, reference was made by the plaintiff's counsel to a deed of release dated in 1863, the year only being stated, which was produced in court by the plaintiffs, but not put in evidence, and which purported to be a release from Ann Watkins Yardley (afterwards Mrs. Holland) to the then trustees of the will. On the first defendant's counsel expressing surprise, the further hearing was ordered to stand till the 11th of January, 1874, and was afterwards postponed from time to time to allow of the attendance of a witness named Francis Robinson Hood, who was suffering from illness. The witness, however, died on the 25th of March, 1875, and the cause now came on again, when his honor read the following judgment.

1875. June 1. SIR JAMES BACON, V.C.: The plaintiffs in this suit, claiming to be interested in a moiety of the real and personal estate of Thomas Watkins, long since deceased, pray, by their bill, that the trusts of the testator's will, so far as the same remain to be performed, may be carried into execution, and the estate administered under the direction of the court. The defendants are principally the persons who are interested in the other moiety of the same estate; the other defendants on the record being trustees, and persons who are parties in a merely representative capacity, having no beneficial interest in the subject. But for the contention raised by the defendants first referred to, the 438] case would have been one of the *most ordinary kind, and would have constituted a simple administration suit. No facts are disputed, no circumstances have occurred which can occasion difficulties or give rise to doubts. The claim, however, which is preferred by the principal defendants is of a very serious character, inasmuch as, if it should prevail, it would give to these defendants an entire moiety of an estate of considerable value, and, as they insist, a half of the other moiety of the same estate. This claim has been argued and insisted upon at great length and with great earnestness, and it depends mainly upon the effect of the Statute of Limitations (3 & 4 Will. 4, c. 27). In order to arrive at a decision upon the points argued, it is necessary to consider briefly the facts out of which they arise.

⁽¹⁾ 20 Beav., 632.

⁽²⁾ 10 Ves., 101.

[His honor stated the case as it appears above, and continued:]

Upon this state of facts it is that the defendants, William Holland, his four infant children, and the trustees of his marriage settlement, insist upon the purchase made by the testator, after the date of his will, of the equity of redemption from Bentley's assignees, and contend that there was consequently no mortgage existing at the testator's death, and that the equitable title, and the right to call for the legal title, of and in the Bencliffe estate descended on his death to his co-heirs-at-law, Sarah Court and Thomas Watkins Yardley; and that one moiety of that estate now belongs to the trustees of Mrs. Holland's marriage settlement, the testator having died intestate as to subsequently-acquired real estate other than mortgage and trust estates.

The plaintiffs and the trustees of the will do not dispute that the true effect of the purchase by the testator of the equity of redemption was to vest in him the whole legal estate, and all beneficial interest in the mortgage, freed and discharged from the trusts expressed in the mortgage deeds; that, consequently, at the time of his death, there was nothing upon which the devise of all his mortgage and trust estates could operate; that the purchase by him after the date of his will was the acquisition of a new and different estate and interest from that which he had purported by his will to devise to them; and they agree with the defendants that the testator was not at the time of his death seised of or entitled to any mortgage or trust estate; nor do they *dispute that the Bencliffe estate, the absolute right [439 and title to which the testator had thus acquired, descended upon his death to his heirs-at-law; and, indeed, the law upon this subject is too well and firmly established to be open to question or doubt.

In *Strode v. Lady Falkland* (1) the decision is expressed in the plainest terms: "And when the equity of redemption was afterwards purchased in, 'twas then as a new acquisition—a new purchase in fee—and did not pass by the will made before." And the Lord Chancellor said: "As to the mortgages, though the equity of redemption be afterwards bought in or foreclosed, yet they cannot pass that, being a revocation *pro tanto*." And although several cases were referred to in the course of the argument, and others may be found referring more or less pointedly to the subject, in none of them can be found anything at variance

(1) 3 Rep. in Ch., 90.

with this statement of the law as it stood at the date of the will.

The defendants have, however, suggested that, though this be so, yet that what they call a "dry legal estate," although without beneficial interest of any kind, passed by the devise to the trustees, and that of that dry legal estate the trustees are seised in trust for the heirs. For this argument I am of opinion that there is no foundation. It is not only inconsistent with their contention—plain in its terms and true in law—that the testator died intestate as to the estate in question, but it would contradict the very words of the will. The estate, which had been a mortgaged estate, held upon trusts by the testator, had before his death ceased to be a mortgaged estate—there were no trusts to be performed by him or by any one who should succeed him—and the will is, in the respect I have been examining, wholly inoperative and ineffectual, and can only be read for the purpose of construction, as if no devise of mortgaged or trust estate had been mentioned in it.

The case of the plaintiffs, therefore, is, that, having regard to the possession of the Bencliffe estate by the trustees of the will from 1826, the statute 3 & 4 Will. c. 27, is an effectual answer to the claim made by the defendants for the first time, by their voluntary answer filed on the 28th of October, 1871; and upon this single point the decision of the 440] case must rest. The *defendants have argued that the statute does not affect their claim, for that the 25th section of the statute prevents the lapse of time from barring them by reason of the estate being held by the trustees upon "express trust," and they rely upon the case of *Salter v. Cavanagh* (*), in which a testator gave lands producing a clear profit rental of £60 to trustees, upon trust to pay annuities for life, the aggregate amount of which was less than the whole amount of the rental; but declared no trust of the surplus. The decision there was, that there was declared an express trust upon the face of the will within the meaning of the 25th section of the Statute of Limitations; and that the heir of the testator was not barred by lapse of time from claiming that which was not actually given to some other person. That case was cited before Lord St. Leonards in *Commissioners of Charitable Donations v. Wybrants* (*), when he declined to give any opinion upon the point whether the "express trust" mentioned in the statute must appear upon the face of the instrument, but decided that the estate having been devised subject to a

(*) 1 D. & Wal., 668.

(*) 2 J. & Lat., 182.

charge, the devisee, being liable to the burthen, was impressed with the character of a trustee for the charity entitled to the charge; and that, therefore, under the 25th section of the statute, the lapse of time formed no bar to the claim of the charity.

No doubt the will in this case does contain express trusts—but of what? So far as the question in dispute arises, they are only trusts of the mortgaged and trust estates belonging to the testator at the date of his will. If the Bencliffe estate remained at the testator's death a trust estate or a mortgaged estate, all the testator's interest in it passed by the will. But the defendants have insisted—and their contention in this respect is supported by the authorities referred to—that, by the manner in which the testator dealt with that estate, he had acquired the absolute and exclusive right to it—he had extinguished the equity of redemption, and wholly annihilated all trusts which once affected it, and had become absolutely seised of an estate different from that which he had disposed of by his will, and of which they say he died intestate. That the devisees in trust thought the estate passed to them upon the trusts of the will is clear, but it is not *upon this ground that they can [44] defeat the defendants' claim. And, when the defendants have succeeded in this contention, that nothing in the Bencliffe estate passed by the will, they destroy at once all notion that there could remain any trusts to be performed by the trustees.

The contention of the defendants that there remains in the trustees a dry legal estate of which they, the defendants, are entitled to a conveyance, is not only wholly inconsistent with their argument that nothing passed by the will, but it is opposed to the plain principles of the law, and equally repugnant to common sense. If the estate passed at all to the trustees, the trusts passed along with it, and are inseparable from it, and the trustees cannot be called upon to convey an estate which they hold upon express trusts for the very purpose of destroying those trusts. But, in truth, this notion of the dry legal estate is wholly visionary and fictitious; it is so dry as to be wholly impalpable, and cannot be said to exist even as a metaphysical entity.

A point was made, in the course of the discussion, of the fact that, in December, 1827, the trustees of the will had procured the assent of Sarah Court, one of the heirs of the testator, to their rescinding the agreement which the testator had entered into with the assignees of Bentley and Fogg for the purchase of the equity of redemption in the Bencliffe

estate, and had paid her £200 as the consideration for such her assent.

No explanation is given of this transaction, and at this distance of time it is not probable that any explanation can be given. Nothing, however, seems to have been done in consequence of it. No claim has been, or can be made by the assignees, and the suggestion of the defendants that they have by virtue of this agreement become entitled, under the will, to a moiety of that moiety of the estate which upon the testator's death descended upon Sarah Court as one of his heirs, is wholly unsustainable.

Now, in this state of things, the case presents at least a remarkable appearance. For nearly half a century the administration of the trusts of the testator's will has proceeded without question. The trustees have been in undisputed possession of the Bencliffe estate, and all the rest of the testator's estate, and have held those estates adversely to 442] all the world except their own *cestuis que trust*, *and have duly administered them according to the trusts of the will. The testator's co-heirs, Thomas Watkins Yardley and John Yardley, who were tenants for life, enjoyed their respective interests without difficulty or question. Thomas W. Yardley's only child, the late Mrs. Holland, settled her share upon her husband and her children. During her life, she enjoyed the interest purported by the will to be given to her, and subsequently to her death, her husband and her children, the defendants, have enjoyed and do enjoy the like interest.

The children of John Yardley are and have been in the like enjoyment; and it is under these circumstances, and at this distance of time, that the claim of the defendants last named is set up.

The answer of the trustees of the will, and the answer of the infant plaintiffs to this claim is, that the undisputed possession of the estate by the trustees since the year 1826 is made by the statute a perfect and complete bar to so stale and unreasonable a demand as that which is now preferred against them. There may, indeed, be cases in which that protection which the statute extends is hardly reconcilable with strict morality. Nevertheless, the law is established upon principles of the soundest public policy, to which, for the common good, private rights and interests must in all cases yield; and it is unquestionably the policy of the law that it is better in all cases that rights, the assertion of which has been neglected for a long period of years, should be disregarded, than that a course of transactions honestly

conducted should be set at naught by permitting a captious chicanery to prevail against the good faith with which they have been conducted.

And of all the cases which can be conceived, it would hardly be possible to find one in which the principles and the policy of the law are more clearly vindicated than that which is the subject of the present litigation. For to admit the claim which the defendants now set up would be, not only to disregard those principles and to counteract that policy, but it would be to give an encouragement and support to an unjust attempt to make the form of the law take the place of that justice which it is the first purpose of the law to establish.

I think it was in an evil moment, and under a total mistake of the law, that this contention was raised. [443 Much time and expense have been wasted in the discussion of a claim by the defendants, the *cestuis que trust* under Mrs. Holland's settlement, which is wholly without foundation, and which has had no other effect than to create a dispute between parties whose interests are equal, and between whom nothing but a perverse ingenuity could have raised the shadow of a question.

The decree will contain a declaration that the plaintiffs, and the defendants entitled under the late Mrs. Holland's settlement, are entitled, in equal moieties, and according to their respective interests, to the whole of the trust estate, the particulars of which, including the Bencliffe estate, will be ascertained. None of the parties desiring that the accounts of the trust estate should be taken, it will be unnecessary to give any directions on that subject. The general costs of the suit must of necessity be borne by the trust estate; but, in ascertaining the amount of those costs, the Taxing Master will disallow to the defendants, William Holland and the trustees of his marriage settlement, all such costs as have been occasioned by the claim preferred by them in respect of the Bencliffe estate, and in respect of the moiety supposed to have belonged to Sarah Court, and to have been relinquished by her in favor of the persons interested in the testator's personal estate.

Solicitors for the plaintiffs and non-opposing defendants: Messrs. *Milne, Riddle & Mellor*, agents for Messrs. *Cunliffe, Leaf & Co., Manchester*.

Solicitors for the opposing defendants: Messrs. *Sharpe & Ullithorne*, agents for Mr. *G. Birch, Lichfield*.

[Law Reports, 20 Equity Cases, 444.]

V.C.B., June 8, 1875.

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*SALAMAN V. GLOVER.

[1875 S. 127.]

Light and Air—Lessor and Lessee—Collateral Agreement—Lease controlled by.

An agreement to grant A. a lease, in a form set out in a schedule, of property in the city as soon as the house then in course of erection by A. on the property should be completed, contained a proviso that nothing therein contained should give A. a right to any easement which did not belong to the premises agreed to be demised as they then existed, nor to any right of light and air derived from over the houses opposite (which belonged to the lessors). The lease subsequently granted was of the land together with the house erected thereon, and all lights, easements, and appurtenances thereto belonging, in accordance with the scheduled form:

Held, that the grant by the lease of lights and easements was controlled by the antecedent agreement, which was to be read as part of the lease; and that A. was not entitled to restrain the lessees of the opposite houses from building so as to obstruct the access of light and air to his premises from over such houses.

In 1869 the plaintiff Salaman, having acquired the residue of a lease granted by the Goldsmiths' Company of a house in Maidenhead Court, in the city of London, surrendered this lease and applied to the company for a building lease of the ground occupied by Nos. 1, 2, 3, 4, Maidenhead Court (having a frontage towards Maidenhead Court and Redcross Square).

On behalf of the company, Mr. Hesketh, their architect, by an agreement of the 17th of June, 1869, agreed that as soon as the house to be erected by the plaintiffs should be covered in, the company would demise by indenture to the plaintiffs the land in question for a term of sixty years—the lease to be in the form annexed to the agreement. And it was provided in the agreement “that nothing herein contained shall be construed as giving to the said Meyer Salaman a right to any easement which does not belong or appertain to the premises hereby agreed to be demised as they now exist, nor to any right of light and air derived from over the houses on the east side of Redcross Square and the south side of Maidenhead Court aforesaid, nor any power or authority to block or obstruct any easement which belongs to any other property of the said Wardens and Commonalty, or of any other person or persons whatsoever.”

445] *The plaintiffs proceeded to pull down the houses 1, 2, 3, 4, Maidenhead Court, and built a new messuage upon their site. After the completion of the new messuage, the Goldsmiths' Company, by an indenture of the 24th of November, 1870, granted to the plaintiffs a lease of the land on

which the new messuage had been erected, "together with the messuage or dwelling-house and premises erected and built thereon, and all cellars, lights, easements, ways, watercourses, privileges, advantages and appurtenances to the said premises belonging," being in the form annexed to the agreement.

In December, 1874, Mr. Hesketh, on behalf of the Goldsmiths' Company, entered into an agreement with the defendants to grant, for building purposes, a lease of land fronting Maidenhead Court, immediately opposite the land demised to the plaintiffs.

The defendants had pulled down the old buildings, about twenty feet high, thereon, and commenced the erection of a new building, which was intended to be of a height much greater than that of the former buildings.

Maidenhead Court is only from 5 ft. 6 in. to 6 ft. 2 in. wide, and the effect of the defendants' new building, if carried up to the height proposed (sixty feet), would be, as alleged by the plaintiffs, completely to darken and render useless for the purposes for which it was now employed the plaintiffs' warehouse or messuage. They had accordingly filed their bill, and now moved for an injunction to restrain the interference by defendants with the access of light and air to the windows of their warehouse.

Mr. Kay, Q.C., and Mr. J. M. Solomon, for the plaintiffs, in support of the motion: We rely upon our lease of the 24th of November, 1870, by which the sight of our warehouse, with all lights, easements and appurtenances, was demised to us by the Goldsmiths' Company. After this demise the company cannot build upon the remainder of their land so as to stop the lights of the house upon the land demised to us for building purposes; and as the company cannot do it, so neither can their vendee or lessee: *Palmer v. Fletcher* ⁽¹⁾; *Gale on Easements* ⁽²⁾. The erection of the defendants' building so *as to darken our windows [446 is an act whereby we have sustained a derogation of rights acquired by our lease, and the antecedent agreement of 1869 cannot be looked at for the purpose of construing or contradicting the plain terms of our lease—i.e., to light unobstructed by anything to be erected on any land which at the time belonged to the grantor; and as the original lessors could not have derogated from their grant, all lessees claiming under them are equally bound: *Compton v. Richards* ⁽³⁾; *Leech v. Schweder* ⁽⁴⁾.

⁽¹⁾ 1 Lev., 122.

⁽²⁾ Page 88.

⁽³⁾ 1 Price, 27.

⁽⁴⁾ Law Rep., 9 Ch., 463.

Mr. *Jackson*, Q.C., and Mr. *Davey*, for the defendants: It may be admitted that if the lease stood alone it would not be competent for the Goldsmiths' Company to build so as to obstruct the light granted to the plaintiffs; and further, that the case must be tried as if the Goldsmiths' Company, and not their lessees, were the defendants.

But the grant contained in the lease is cut down by the proviso in the antecedent agreement, which is a binding collateral agreement affecting the enjoyment of the land demised, capable of being enforced independently of the lease, although not incorporated in it: *Morgan v. Griffith* ⁽¹⁾; *Erskine v. Adeane* ⁽²⁾.

The company intended at the time to grant a building lease of the opposite site, and would not have granted a lease to the plaintiffs except upon the collateral understanding that the legal right to an uninterrupted access of light and air was to be excluded. Having thus contracted themselves out of their right to complain of any obstruction to their easement of light and air in a particular direction, the plaintiffs are not entitled to an injunction. So far as their case is rested upon a title by prescription, independently of the grant contained in their lease, the answer is that a tenant cannot prescribe against his own landlord, or any one claiming under him.

[They referred to *Leech v. Schweder* upon this point.]

Mr. *Kay*, in reply: The whole fallacy lies in calling the agreement of 1869 a collateral agreement. To be collateral, 447] it must in no way *contradict, and must not contain any terms "which conflict with the written document:" *Morgan v. Griffith* ⁽³⁾.

The agreement on which the defendants rely is inconsistent with and directly contradicts the terms of the lease, by restricting that which was unrestricted, and to admit it as controlling the terms of the lease would be against every rule of evidence and construction, and beyond the authorities of *Morgan v. Griffith* or *Erskine v. Adeane* ⁽⁴⁾, where the stipulation relied on was not a parol variation of the lease, but a collateral promise made as a consideration for the execution of the lease. But if the antecedent agreement can be looked at, it was merely an *interim* provision, operating only until the house was built and the formal lease granted.

SIR JAMES BACON, V.C.: I cannot think there is any such right as has been asserted on the part of the plaintiff.

⁽¹⁾ Law Rep., 6 Ex., 70.

⁽³⁾ Law Rep., 6 Ex., 70.

⁽²⁾ Law Rep., 8 Ch., 756.

Whether the agreement is collateral or not is a matter of very slight importance. It is to be construed by the court for the purpose of deciding the rights of the parties. The history of the agreement is clear upon the evidence, and without evidence would almost tell its own story. The Goldsmiths' Company, having land which they were about to let for building purposes, agreed to let it to the plaintiff, and in order that he who was going to lay out his money might have some sort of security, this agreement was entered into, upon which he was put into possession and at liberty to commence his building operations. He was to have a lease, but not until a certain progress should have been made in the building, and the lease was to be made "in the form hereto annexed." Then comes the proviso. How, then, is the proviso contained in an agreement—that he shall have a lease in the form hereto annexed with a proviso—to be dealt with? Is it not the right of the lessor, the lease being executed in the terms there prescribed, to come to the court and say, "Insert in the lease that proviso which was part of the original contract?" Can I read the lease as meaning anything else but being governed by that proviso? I think not in point of law. In point of reason and justice I have not a shadow of doubt about it; but in point of law I think the Goldsmiths' Company have a right to say that the *agreement speaks for itself. There [448 is a lease which is in proper terms, and demises the easements, and the light, and all the other things included in those general words; but inasmuch as other operations are going on there which make it necessary to qualify the generality of that demise, it is provided that "nothing herein contained"—and although stress was laid on that expression "herein contained," I must read the prescribed form of lease as being contained in the schedule to it—"shall be construed as giving to Mr. Salaman a right to any easement which does not belong or appertain to the premises hereby agreed to be demised as they now exist, nor to any right of light and air derived from over the houses on the east side of Redcross Square and the south side of Maidenhead Court aforesaid, nor any power or authority to block or obstruct any easement which belongs to any other property of the said company, or any other person or persons whomsoever." I must read these words for all purposes of construction to decide legal rights as if they were inserted in the lease which has been executed, and in my opinion the plaintiff is bound by that proviso. He is bound not to claim light and air for the houses on the south side of the

Maidenhead Court. He is bound by every other restriction which is there contained, and the words "lights and easements" are to be read with that qualification. There must be other lights, there may be other easements; what there must be or may be, I do not know, nor need I now inquire. But the words contained in the demise have their full potency and effect subject to the proviso, which, in my opinion, is so clear that no doubt whatever can be entertained about the intention of the parties, or the legal effect of the documents which have been executed.

Motion refused with costs.

Solicitors: Messrs. *Hilleary*; Mr. *J. P. Biggenden*.

[Law Reports, 20 Equity Cases, 456.]

V.C.H., May 26, 1875.

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**In re TINKLER'S ESTATE.*

Will—Trust Legacy—Tenant for Life and Remainderman—Capital and Income—Apportionment between.

A testator bequeathed a legacy of £10,000 with interest from his death at 4 per cent. per annum to trustees upon trust to pay the income to certain persons during the life of one of them, and after her death upon trust for other persons.

The testator's estate was insufficient for payment in full of his legacies, and the realization of his assets occupied several years:

Held, that moneys from time to time received by the trustees and applicable to the legacy were divisible ratably between capital and income, so as to attribute to income £4 per cent. from the testator's death on the amount attributed to capital.

MR. WILLIAM TINKLER, by his will, dated the 25th of June, 1849, amongst other legacies, bequeathed unto Richard Tinkler and William Alexander Tinkler, their executors, administrators, and assigns, "the sum of £10,000, with interest for the same at £4 per cent. per annum from my decease," upon trust to invest the said sum of £10,000 as in the said will mentioned, and to stand possessed of the said sum of £10,000 and the investments thereof, "and the interest, dividends, and annual proceeds thereof," upon the trusts thereafter declared concerning the trust moneys thereafter directed to be holden upon trust for the benefit of Mary Ann Rachel Brunskill and her child or children, "and the interest, dividends, and annual proceeds thereof;" and the testator declared that the receipts of his trustees or trustee for the time being should be effectual discharges "for the said sum of £10,000, and the interest thereof." The trusts for the benefit of M. A. R. Brunskill and her child or children thus referred to were trusts under which

the trustees or trustee were from time to time during the life of M. A. R. Brunskill to receive the interest, dividends, and annual proceeds of the trust fund, and to pay or apply so much thereof as they thought fit upon certain trusts for the benefit of her and her children, and to invest the surplus income, and after her death to stand possessed of the trust fund and all accumulations upon trust for her chil- [457 dren living at the death of the testator, or born afterwards, and who should attain the age of twenty-one, as tenants in common. The trustees, Richard Tinkler and William Alexander Tinkler, were also the executors of the will.

The testator died in May, 1853, and his estate was not sufficient for the payment in full of the legacies bequeathed by his will. A large part of his assets consisted of a debt due from a firm to whom time for payment was given by his executors under powers contained in his will; and the failure of this firm some years after the death of the testator further delayed the realization of his estate. From time to time, however, dividends were paid by the firm in question to the executors, which dividends consisted partly of sums on account of principal, and partly of interest on the amount for the time being due. The executors divided each dividend as it was received into principal and interest, invested the principal sums towards making up the capital of the £10,000 legacy, and applied the sum which represented the interest upon the trusts declared by the will as income of the £10,000.

On the 8th of January, 1872, a decretal order for the administration of the testator's estate was made upon a summons in Chambers, taken out by the residuary legatee under the testator's will. By his certificate in this suit the Chief Clerk only allowed to the executors in respect of payments for income such interest as the capital sums so invested on account of the £10,000 had actually yielded, and disallowed them the sums so appropriated by them to interest on the £10,000 out of the dividends aforesaid, on the ground that as the estate was not sufficient to pay the legacies in full, such sums, though paid as interest, ought to be treated as capital.

The executors then took out a summons to have the certificate varied by allowing to them the sum of £1,026 19s. 6d., which represented interest after the rate of £4 per cent. per annum on the amounts from time to time invested on account of the capital of the legacy, from the death of the testator to the date of the respective investments; and this

summons being adjourned into court now came on with the further consideration of the suit.

458] *Mr. *Daniel Jones*, for the defendants, the executors, in support of the summons: The disallowance of these payments is plainly erroneous. The testator has himself directed that the legacy of ten thousand pounds shall carry interest at £4 per cent. per annum from his death. This interest is specifically given to the legatees, just as much as the capital, and the persons entitled to the income of the legacy have a right to participate, *pro rata* in whatever the estate may yield, notwithstanding the assets are insufficient for the payment of the legacies in full. The true principle is, that on each occasion when the trustees made an investment on account of capital a sum equal to £4 per cent. per annum on the amount so invested from the date of the testator's death to that of the investment should have been credited to income, and the trustees ought to be allowed on income account the aggregate amount of the interest on the sums from time to time invested, calculated on this footing.

Mr. *Gregory Walker*, for the plaintiff, supported the finding of the Chief Clerk.

Mr. *Jason Smith*, for other defendants.

SIR CHARLES HALL, V.C., said that all moneys appropriated towards the £10,000 legacy were divisible ratably between capital and income, and the certificate must be varied accordingly. His honor then made the following order: Declare that all moneys received by the trustees, or either of them, from the estate of the testator, William Tinkler, and applicable to the legacy of £10,000 bequeathed to them by the testator upon trust, were divisible ratably between capital and income, and that accordingly the defendants, the trustees, are entitled to be allowed on account of payments made by them for income (in addition to the sums already allowed) a sum equal to £4 per cent. per annum on each sum invested by them to answer the said legacy, from the death of the testator to the date of such investment.

Solicitors: Messrs. *Allen & Son*.

[Law Reports, 20 Equity Cases, 462.]

V.C.H., June 8, 1875.

*ALLEN V. MARTIN.

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[1874 A. 132.]

Ornamental Garden—Contract with Agent of Lessees of Houses—Right of Owners in Fee—Breach of Contract—Equitable Jurisdiction—Injunction.

The owner in fee of a garden over which the tenants of his adjoining houses had rights of enjoyment and management:

Held, entitled to an injunction to restrain continuing trespasses involving nuisances in the garden committed by a person acting under color of a contract to improve the garden entered into between him and the tenants.

THE plaintiffs, G. H. Allen and the Rev. W. Smith, as the trustees under the will of the late Lord Southampton, were entitled in fee simple to the ornamental gardens in Euston Square, and also entitled, but in reversion, to the houses abutting upon the square. The occupiers of the houses were entitled to the enjoyment of the gardens, and the defendant G. F. Graham, an estate agent in the neighborhood, had, for some time past, on their behalf, had the management of the garden south of the Euston Road. In the summer of 1874, the defendant Graham proposed to make alterations and improvements in that part of the gardens, by having the soil raised, and other things done, and for that purpose the defendant J. H. Martin, on the 14th of October, 1874, entered into a contract with him "to execute and perform the whole of the following works for the sum of £60, payable on completion: to remove the iron railings to the southern inclosure of Euston Square, to form draw-in for carts, to take up the several grass plots, move the surface mould, and to fill in a new bottom with good hard core of an average depth of two feet, relay mould and plots with new where necessary, prick up the gravel walks, and fill in with hard core to a uniform level, and alter and make good all drains, provide and lay 200 yards of good hard binding garden gravel, remove the plants, shrubs, and mould from beds and borders, fill in to a proper and approved level with 400 yards of good mould, replant shrubs, &c., with part new, and lay new grass verges, repair and refix all iron work to north side of southern inclosure, make good all damage done, and clear away all rubbish, the whole of the work *to be executed in a good and workmanlike manner, [463 and to the entire satisfaction of" the defendant Graham. The defendant Martin commenced the works, and in November he, without any authority from the defendant Graham,

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commenced digging out and selling the sand subsoil of the garden, and allowed hoardings for advertisements to be erected along the front of the garden. The plaintiffs and the defendant Graham remonstrated with him, and he then promised that the digging of sand should be discontinued, the hoardings removed, and that the works should in future be done to the defendant Graham's satisfaction. In December, the defendant Martin again allowed hoardings to be erected along the whole front of the garden by Messrs. Willing & Co., and instead of bringing on to the garden good hard core for the purpose of raising the ground, he allowed the garden to be made a place for dust-bin rubbish, and other offensive matters, street sweepings and slush, for which he received payment for every cartload brought there. Fires were lighted in the garden, at which were burnt old paper, straw, and other combustible rubbish, and a nuisance was caused to the occupiers of the adjacent houses. The plaintiffs, finding remonstrance unavailing, filed, on the 22d of December, 1874, this bill to restrain the defendant Martin from entering or remaining upon the garden, and from carting, bringing, or laying any soil or other matter or material therein, and from in any way dealing or interfering with the same until the further order of the court, and for damages and costs of the suit. Upon an *ex parte* application, made immediately after the bill was filed, the plaintiffs obtained an order restraining the defendant Martin from entering on the garden. In February that order was relaxed, and he was allowed to continue the works, but in March an injunction was granted against the defendant Martin, the plaintiffs adducing evidence which showed that he was again bringing on to the garden objectionable materials, and digging up the sand. The cause now came on to be heard, on motion for decree. The defendant Martin, in cross-examination, stated that he had allowed 250,000 loads of matter to be deposited in the garden, for which he had received sums varying from 6d. to 1s. for each cart-load. The written and oral evidence, in the view of the court, [464] established *that after the interview in November, 1874, between the defendants Graham and Martin, and the solicitor of the former and of the plaintiffs, a large quantity of dust-bin rubbish was from time to time brought on to the garden by the defendant Martin; that during the same period some of the dust-bin rubbish was burnt in the garden, thereby creating a nuisance of such magnitude as to be cognizable by this court; that the defendant Martin during the same period made excavations in the garden to a greater

extent than was necessary for the proper execution of the works mentioned in the contract, and that the plaintiffs when they filed their bill were warranted in concluding that such conduct on his part would be continued.

Mr. *Dickinson*, Q.C., and Mr. *Edward J. Foster*, for the plaintiffs, after referring to the case of *Goodson v. Richardson* (¹), contended that there was sufficient privity of contract between them and the defendant Martin to entitle them, on behalf of themselves and their lessees of the adjacent houses, to ask the court for an injunction to restrain him from committing further waste and spoliation in the garden; and from further continuing the nuisance to which the lessees and occupiers of the houses had been subjected. The plaintiffs were entitled to an injunction to protect their property, and the rights of their lessees, from injury.

Mr. *Greene*, Q.C., and Mr. *Romer*, for the defendant Martin, submitted that there was no privity of contract between him and the plaintiffs, as the contract was between him and the agent of the lessees or occupiers of the adjacent houses, and was not binding upon the plaintiffs at all, for they had not adopted it. The case of *Goodson v. Richardson* was a distinct authority in the defendant Martin's favor. The question was, had the defendant Martin injured the freehold? and there was no proof that he had, therefore the plaintiffs had no just cause of complaint; further, no injury had been done to the adjacent houses, and as to them, therefore, the plaintiffs, who were merely reversioners, had no ground of complaint. The smoke from the fires might have annoyed the occupiers, but that was no ground to entitle the *plaintiffs to come to that court for relief: *Mott* [465 v. *Shoolbred* (²)]. The plaintiffs' evidence had not established that there had been any injury committed, and if the facts alleged had been proved, their remedy would be by action in ejectment.

SIR CHARLES HALL, V.C.: I do not propose to grant an injunction against the defendant Martin in the terms asked and turn him out of the garden, nor do I intend to order an inquiry as to damages, but I shall grant an injunction to restrain him, his servants, agents, and workmen, from making any excavation in the garden to a greater extent than will be required for the purpose of the works mentioned in the contract, and that will prevent the removal of gravel or sand from the garden; also from using for the purpose of such works anything other than such hard core or other proper materials as are mentioned in the contract, and also

(¹) Law Rep., 9 Ch., 221.

(²) *Ante*, p. 22.

from bringing upon the garden, or allowing to remain there, or burning in the garden, the dust-bin or other rubbish not mentioned in the contract. [After stating the result of the evidence as above set forth, his honor continued :] I am of opinion that the plaintiffs were right in coming to this court for an injunction to prevent a repetition of the acts and nuisances complained of, and that the court ought to grant, in the terms which I have already stated, a perpetual injunction to prevent their repetition. In reference to the argument that this is not a case in which this court ought to interfere by injunction, I may observe that the plaintiffs are in the position of owners in fee simple of the garden in question, subject to certain rights of their tenants, the occupiers of the adjacent houses. The plaintiffs are also in the position of reversioners expectant on the determination of the leases held by the lessees, the tenants or the occupiers of those houses. The rights which those lessees or occupiers have in the garden are of some importance to them, and the plaintiffs have no right to interfere with or prevent those rights being fairly and properly exercised. The occupiers of the houses contribute towards the expenses incurred in keeping the garden in good order, and they appoint 466] *some one, at present the defendant Graham, their representative or agent, to make arrangements for that purpose, and he, on their behalf, entered into the contract of the 14th of October, 1874, with the defendant Martin, who undertook to do works which involved very considerable alterations in the garden. The plaintiffs might, perhaps, having regard to their actual position as owners of the garden, have said that such works should not be done ; that the contract by the defendant Graham was beyond his power or that of the occupiers to enter into, but when the conduct of the defendant Martin was brought under their notice they acted like reasonable men, and, indeed, in their own interest, and they allowed their solicitor to attend the meeting at the end of November, 1874, at which the defendant Martin was remonstrated with and threatened with legal proceedings for digging and selling the sand, and at which he promised that in future he would do the works in accordance with the terms of the contract and to the satisfaction of the defendant Graham. In that way there sprung up between the plaintiffs and the defendant Martin something very much like a contract, and from that time the plaintiff's agent watched the defendant Martin's proceedings, and from time to time interfered with him in regard to them. When the plaintiffs found that the defendant Martin was doing things

which he was not authorized to do, particularly having regard to the arrangement come to at the end of November, they no doubt might, as legal owners of an estate in possession, subject only to the rights of the lessees and occupiers of the houses, have taken steps to eject him, but if they had adopted that course it would probably have led to further litigation and brought about proceedings at law which might have been considered harsher than the necessities of the case required. The plaintiffs took a different course. They knew they were entitled to the legal estate and could bring an action in ejectment, against which probably the defendant Martin would have had no good defence; but as they found him continually committing fresh trespasses and nuisances—for every time he brought on to the garden any of the objectionable materials mentioned a fresh trespass was committed, and every time he burnt any of those materials a fresh nuisance was committed, and every time he removed any sand from the garden there *was a new [467 trespass to and spoliation and waste of their property—they filed this bill. It was contended that this court has, in that state of things, no jurisdiction to interfere by way of injunction, and that the decision in *Goodson v. Richardson* is not only not an authority in favor of the plaintiffs, but that it is in favor of the defendant Martin. In my opinion, however, that case is in favor of the plaintiffs, for Lord Selborne said (¹): “I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man’s land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time to the gain and profit of the trespasser without the consent of the owner of the land, and it appears to me as such to be a proper subject for an injunction;” and Lord Justice James said (²): “The defendant in this case is admittedly a trespasser . . . and he proposes to continue that trespass from day to day. . . . It is said that we ought to allow this to be done, that we ought, in fact, to dismiss the plaintiff from this court, and tell him to find his way to another court, in which he is to bring an action for the wrong, for which there is no defence whatever. . . . I do not know whether more than one will be required—and then having succeeded in one action or two actions, or perhaps three actions, all of which on the facts proved in this case would necessarily result in verdicts for him, he is to come back to this court and obtain a perpetual injunction on the ground of repeated vexation and repeated actions. I do not think that there is any

(¹) Law Rep., 9 Ch., 224.

(²) Law Rep., 9 Ch., 226.

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principle in this court which will compel us to drive the plaintiff to go through all that litigation before he is entitled to that relief which he would ultimately get when he had gone through it." If the plaintiffs had to go through all those processes, and be obliged to leave their property all the time exposed to the wrongful acts complained of, it would be a most disgraceful state of things, and if such a state of things is to receive judicial countenance I shall not be the first judge to do it, especially considering that after November next each court will be capable of disposing of every case brought before it. But however that may be, there is in my opinion even now in this court ample jurisdiction in a case of this kind to protect the property of the plaintiffs, and therefore I propose to give them the relief which I have 468] *already stated, and I grant that relief the more readily considering the interest of the plaintiffs in the garden; their peculiar position in reference to their lessees and occupiers of the adjacent houses, and their being not unreasonably associated with the defendant Graham; the threatened action in ejectment against the defendant Martin, and the violation of the arrangement which he entered into at the end of November, 1874, with the plaintiffs, and which has aided, if not indeed created, the jurisdiction of the court over this case. The costs of the motion must be costs in the cause, and the defendant Martin must pay them all, and there will be liberty to apply.

Solicitor for the plaintiffs: Mr. *John Hopgood*, agent for Mr. *Jacob Birt*.

Solicitor for the defendant: Mr. *Drawbridge*.

[Law Reports, 20 Equity Cases, 474.]

M.R., May 28, 1875.

474] *RUSSELL V. WAKEFIELD WATERWORKS COMPANY.

[1875 R. 43.]

Company—Suit by Shareholder on behalf of Himself and other Shareholders—Illegal Payment by Directors—Ultra vires—Form of Suit.

Where a shareholder in an incorporated company filed his bill on behalf of himself and all other shareholders against the directors and the promoters of a bill in Parliament for a rival purpose, alleging an illegal payment of the company's money to such promoters to buy off their opposition, and praying that it might be replaced:

Held, on demurrer, that it was not sufficiently alleged in the bill that the payment was *ultra vires*:

Held, also, there being no allegation that the company would not sue, that it was not a case in which the suit could be maintained in its present form; and that the demurrer must be allowed, with leave to amend.

Observations on the exceptions to the general rule, that the company and not an individual corporator must sue when the trust funds of the company have been misapplied.

DEMURRER. The bill was filed by the plaintiff Henry Edward Russell, on behalf of himself and all other the shareholders in the Wakefield Waterworks Company, except such of the defendants as were shareholders therein.

The defendants were the said Wakefield Waterworks Company, the six directors of the same company, and the six promoters of an undertaking called the Wakefield and District New Water Bill.

The bill alleged that in the year 1874 the plaintiff became, by purchase, the duly registered owner of two fully paid-up shares in the defendant company; that he afterwards heard of the payment of £5,500 to the promoters of the Wakefield and District New Water Bill to buy up their opposition; that in the balance-sheet for the half-year ending the 30th of June, 1874, there was the following entry in the capital account: "Parliamentary expenses, £8,517 14s. 9d."; and that the balance-sheet for the half-year ending the 31st of December, 1874, contained the following entry: "Parliamentary expenses, £9,083 10s. 11d."; but that neither the balance-sheets nor the reports contained any explanation of these entries:

*That the plaintiff's solicitor was informed by the [475 secretary to the company that the sum of money paid to the promoters of the New Water Bill was included in the said sum of £8,517 14s. 9d., and charged to the capital account of June, 1874, and was paid by the directors in accordance with a resolution of the shareholders, authorizing them to do all necessary acts, and in exercise of the lawful powers of the directors, and that the accounts containing the payments had since been passed and confirmed by the shareholders:

That the plaintiff had ascertained the following facts with reference to the transaction in question: During the session of Parliament in the year 1874 the defendants, the directors of the waterworks company, introduced a bill into Parliament authorizing them to make new reservoirs and works, and to raise more money, and to extend their limits of supply. During the same session a bill was introduced by the defendants, the promoters thereof, intituled the Wakefield and District New Water Bill, whereby it was proposed to erect waterworks of a similar character to those proposed by the defendant company for the supply of Wakefield and

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its neighborhood, and the promoters lodged a petition against the bill introduced by the said directors. On the 9th of April the promoters of the Wakefield and District New Water Bill withdrew their bill, such withdrawal being, as the plaintiff alleged, the result of a corrupt agreement made between the promoters of that bill and the directors of the defendant company, and which was in the following terms:

"Terms of arrangement between the Wakefield Waterworks Company and the Wakefield New Waterworks Company made this 7th of April, 1874. The directors of the Wakefield Old Waterworks Company pledge their words as men of honor to proceed with their present application to Parliament for a supply of water from Langsett, and to use their utmost endeavors to secure the passing of their new bill in both Houses of Parliament during the present session, and will also pay to the directors of the Wakefield New Waterworks Company the sum of £5,500 for the costs and expenses incurred by them in connection with their present scheme, on condition that the Wakefield New Waterworks Company do forthwith withdraw their bill now 476] before Parliament, and *also withdraw at once the petition filed by the Wakefield New Waterworks Company and the inhabitants and consumers of water in Wakefield and its neighborhood, recently lodged or filed, and do use their influence, and do render all the assistance in their power to the directors of the Wakefield Old Waterworks Company (if and when required by them) at the expense of the said last-named company, to secure the passing of the present bill of the Wakefield Old Waterworks Company, now before Parliament, into law during the present session of Parliament. As witness the hands of the directors of the said two companies." This agreement was signed by the several defendants the directors of the defendant company, and by the several defendants the promoters of the said bill, on the 7th of April, 1874, and on or about that date the directors of the defendant company paid to the promoters of the said bill out of the moneys of the defendant company the sum of £5,500.

The bill alleged that the promoters had express notice that the sum of £5,500 was paid out of the moneys of the defendant company, and that the directors had no authority so to pay the same; that no general meeting of the shareholders of the defendant company was held, and no resolution passed for the purpose of authorizing the said agreement, or the payment of the said £5,500.

The plaintiff insisted that the transaction was illegal, and that its illegality was known to the directors and promoters; and he charged that the said sum of £5,500 was illegally paid out of the capital and funds of the defendant company to the said promoters, and that they received such moneys with full notice and knowledge that the same was being so paid to them illegally, and by a breach of trust; that the promoters concurred in such breach of trust; and that the directors and promoters were liable to repay the same.

The bill prayed that it might be declared that the agreement of the 7th of April, 1874, and the said payment of the sum of £5,500 were not within the powers of the defendant company; that an account might be taken of the moneys so paid, and that the defendants, the directors and promoters, might be ordered to repay the same.

The defendants demurred generally for want of equity.

*Mr. *Bagshawe*, Q.C., and Mr. *Bunting*, for the de- [477
fendants, in support of the demurrer: This bill seeks to recover back a sum of money paid by the defendants, the directors of the waterworks company, to the other defendants, the promoters of the bill which was withdrawn, on the ground that such payment was *ultra vires*; but there are, we submit, no sufficient allegations in the bill to show that the act complained of was beyond the powers of the directors.

Further, the suit is wrongly framed. A bill like this, to recover moneys belonging to a corporate body alleged to be improperly paid to a stranger, cannot be filed by an individual shareholder, unless it is distinctly alleged that the corporation or company have refused to sue, or that there is some reason which prevents the company from suing: *Gray v. Lewis* (¹); *Mozley v. Alston* (²); *Foss v. Harbottle* (³).

It is not alleged in this bill either that the defendant company has refused to sue, or that it is incapable of suing: on these grounds, therefore, as well as on the first, we contend that the demurrer should be allowed.

Mr. *Chitty*, Q.C., and Mr. *W. W. Cooper*, for the plaintiff, in support of the bill: The conduct of the directors of the waterworks company in entering into the agreement with the promoters of a rival company, and paying them the sum of £5,500 to buy off their opposition, was, on the facts alleged in the bill, both illegal and *ultra vires*. The directors were in the position of trustees for the company,

(¹) Law Rep., 8 Ch., 1035.

(²) 1 Ph., 790.

(³) 2 Hare, 461.

and, as such, they are liable in this court to account for the company's money which they have misapplied. The bill alleges that the promoters received the money with notice that it was the property of the company. That would be sufficient to render them in this court liable to account for it: *Ferguson v. Wilson* ('); *Hodgkinson v. National Live Stock Insurance Company* ('); *Maunsell v. Midland Great Western (Ireland) Railway Company* ('); *Atwool v. Merryweather* (').

478] *In *Salomons v. Laing* ('), where money belonging to one railway company had been improperly paid over by the directors to the directors of another company who had notice of the breach of trust, and a bill was filed by a shareholder of the first company on behalf of himself and the other shareholders against the directors of both companies to recover back the fund, it was held on demurrer that the directors of the second company were properly made parties to the suit, and also that such a suit might be instituted by an individual shareholder, although it was not alleged that the company had refused to sue. That case is a direct authority in favor of the bill being framed in its present form.

Mr. *Bagshawe*, in reply, on the question whether the plaintiff should have leave to amend.

SIR G. JESSEL, M.R.: I am of opinion that this bill is open to general demurrer on two grounds. The nature of the case which I suppose was intended to be made by the bill is that the waterworks company were not authorized to pay a sum of £5,500 to the promoters of an opposition company, who were opposing a bill for extending the powers of what I will call the old company, in order to buy off the opposition. The bill seeks to make liable both the directors of the old company who had paid the money and the promoters of the new company who received the money.

The two objections, which I think are well founded, are these: first, it is said there is no case made by the bill showing that the act complained of was beyond the powers of the old company, there being no direct allegation of fraud, although the word "corrupt" is used; and secondly, it is said that, even if the act complained of was shown to be *ultra vires*, it was a case in which the old company, which was an incorporated company, ought to sue. [His honor then reviewed the allegations in the bill, and considered that

(') Law Rep., 2 Ch., 77.

(4) Law Rep., 5 Eq., 464, n.

(2) 4 De G. & J., 422.

(5) 12 Beav., 377.

(3) 1 H. & M., 130.

the bill did not sufficiently allege that the payment complained of was beyond the powers of the old company.]

A great deal of the argument in this case turned upon what *may be described perhaps, in one sense, as a [479 technical objection, but which is a very formidable and important objection. It was said that this is a bill to make a stranger pay back money belonging to a company which the stranger has illegally or improperly possessed himself of, or appropriated to his own use, and that any person who takes possession of a trust fund is liable to be sued in equity by the owner of the trust fund if he had notice at the time that it was a trust fund; and although he gave value, still in that way the bill can be maintained against him.

The answer was, that where the owner of the trust fund is an incorporated company, the corporation is the only party to sue; the stranger has nothing whatever to do with the individual corporators; and although in a sense it is their property, because individual corporators make up the corporation, yet in law it is not their property, but the property of the corporation, and therefore the right person to sue is the corporation, who is the *cestui que trust* or equitable owner of the fund. That I take to be the general rule of this court. In this court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this court say that he is not a constructive trustee.

But the general rule being that the *cestui que trust* must sue, and not the individual corporator who has only an ultimate beneficial interest, the only point remaining to be considered is, whether there are any exceptions to the general rule. I entirely agree that the general rule, if I may say so respectfully, is correctly stated by Lord Justice James in the case of *Gray v. Lewis* (1): "Where there is a corporate body capable of filing a bill for itself to recover property, either from its directors or officers, or from any other person, that corporate body is the proper plaintiff, and the only proper plaintiff." I do not understand the Lord Justice to intend to state more than the general rule, because he began by saying: "It is very important, in order to avoid oppressive litigation, to adhere to the rule laid down in *Mozley v. Alston* (2), and *Foss v. Har-* [480

(1) Law Rep., 8 Ch., 1035, 1050.

(2) 1 Ph., 790.

bottle (¹), which cases have always been considered as settling the law of this court." So that in laying down the general rule he did not intend to impeach or interfere with those cases, but only to express the result of them. In reality *Mozley v. Alston* (²) simply affirmed *Foss v. Harbottle*, and therefore when you want to find the rule you must look to *Foss v. Harbottle*, where you will find the general rule is that which I have stated. But that is not a universal rule; that is, it is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case; that is, the necessity for the court doing justice.

In *Foss v. Harbottle* (³) Vice-Chancellor Sir J. Wigram says this: "The first objection taken in the argument for the defendants was that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on the part of the defendants. I think there are cases in which a suit might properly be so framed. Corporations like this of a private nature are in truth little more than private partnerships, and in cases which may easily be suggested it would be too much to hold that a society of private persons associated together in undertakings which, though certainly beneficial to the public are nevertheless matters of private property, are to be deprived of their civil rights *inter se* because, in order to make their common objects more attainable, the Crown or the Legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham, in *Wallworth v. Holt* (⁴) and other cases would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue." That I take to be the correct law on the subject. 481] It remains to consider what are those exceptional cases in which, for the due attainment of justice, such a suit should be allowed. We are all familiar with one large class of cases which are certainly the first exception to the

(¹) 2 Hare, 461.

(³) 2 Hare, 491.

(²) 1 Ph., 790.

(⁴) 4 My. & C., 619, 635.

rule. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a bill, indeed, may be maintained by a single corporator, not suing on behalf of himself and of others, as was settled in the House of Lords in a case of *Simpson v. Westminster Palace Hotel Company*⁽¹⁾. If the subject matter of the suit is an agreement between the corporation acting by its directors or managers and some other corporation or some other person strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a defendant to the suit, because that other corporation or person has an interest, and a great interest, in arguing the question and having it decided, once for all, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member. So that in these cases you must always bring before the court the other corporation.

The cases are so numerous on this subject, that one ought not perhaps to refer to them. But I may mention a few of them. There is, first, the well-known case of *Hare v. London and North Western Railway Company*⁽²⁾; there is the case of *Simpson v. Denison*⁽³⁾; there is a case of *Deman v. Rufford*⁽⁴⁾; and a vast number of cases as regards agreements between railway companies which have been held to be *ultra vires*. When you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you are entitled to as regards the first, you are entitled to have relief against the second for something that has been done under the *ultra vires* agreement. You may be entitled to have money paid back which has been paid under the *ultra vires* agreement, as in the case of *Salomons v. Laing*⁽⁵⁾, and you may be entitled to have property returned or other acts done. If the detainer or holder of the money or property, that is, the *second [482 corporation or other person, is already a party, and a necessary party, to the suit, it would be indeed a lame and halting conclusion if the court were to say it could do justice in a suit so framed by ordering the money to be returned or the property restored. It is a necessary incident to the first part of the relief which can be obtained by individual corporators, and will do complete justice on each side, and

⁽¹⁾ 8 H. L. C., 712.

⁽²⁾ 2 J. & H., 80.

⁽³⁾ 10 Hare, 51.

⁽⁴⁾ 1 Sim. (N.S.), 550.

⁽⁵⁾ 12 Beav., 377.

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that has always been the practice of the court. Therefore, in a case so framed there is no objection to a suit by an individual corporator to recover from another corporator, or from any other persons being strangers to this corporation, the money or property so improperly obtained. But that is not the only case. Any other case in which the claims of justice require it is within the exception.

Another instance occurred in the case of *Atwool v. Merryweather* ⁽¹⁾, in which the corporation was controlled by the evil-doer, and would not allow its name to be used as plaintiff in the suit. It was said that justice required that the majority of the corporators should not appropriate to themselves the property of the minority, and then use their own votes at the general meeting of the corporation to prevent their being sued by the corporation, and consequently in a case of that kind the corporators who form part of the minority might file a bill on their own behalf to get back the property or money so illegally appropriated. It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shown either that the wrongdoer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shown that there has been a general meeting substantially approving of what has been done; or if it can be shown from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit. As I have said before, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way 483] to restrain *the generality of the terms made use of by the learned judge who decided the case of *Foss v. Harbottle* ⁽²⁾. Therefore I cannot help seeing it is quite possible so to amend this bill as to get rid of the difficulty which now exists, and I think that on this part of the case I should give leave to amend. Of course, in allowing the demurrer, I allow it in the usual form.

Solicitor for the plaintiff: Mr. *Horace Philbrick*.

Solicitors for the defendants: Messrs. *Singleton & Tattershall*; Messrs. *Torr & Co*.

⁽¹⁾ Law Rep., 5 Eq., 464, n.

⁽²⁾ 2 Hare, 461.

[Law Reports; 20 Equity Cases, 492.]

M.R., June 8, 9, 1875.

*PEARCE V. WATTS.

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[1873 P. 168.]

Vendor and Purchaser—Specific Performance—Reservation of "Necessary Land for making Railway"—Defence not raised by Demurrer—Costs.

Contract for the sale of an estate, vendor reserving "the necessary land for making a railway" through the estate to P. In a suit by the purchaser for specific performance:

Held, that the reservation was void for uncertainty, and that the contract could not be enforced:

Held, also, that, though the defence was raised by answer and not by demurrer, the bill must be dismissed with costs.

THE defendant, T. Watts, had entered into an agreement with the plaintiff for the sale to him of an estate with the following reservation: "T. Watts reserves the necessary land for making a railway through the estate to Prince Town."

The defendant having refused to complete, the plaintiff filed his bill for specific performance. The defendant put in an answer, the principal defences being that the contract was void for uncertainty, and that the defendant at the time when he entered into it was of unsound mind.

Mr. *Southgate*, Q.C., and Mr. *Bevir*, for the plaintiff: The contract for the sale of the estate is one which this court will enforce, and the reservation contained in it does not render it void for uncertainty. The court can ascertain what land is necessary for making the railway: *Bedford and Cambridge Railway Company v. Stanley* ⁽¹⁾. In *Sanderson v. Cockermouth and *Workington Railway* [493 *Company* ⁽²⁾] there was a contract for sale with the following reservation: "Subject to the making such roads, ways, and slips for cattle as might be necessary." In that case the court directed a reference to ascertain what was necessary or proper.

It may be said that the contract cannot be carried out by a conveyance, but, as what the vendor contemplated was a compulsory purchase by the railway company, there might be a covenant that the purchase-money of any land taken by the company should be paid to the vendor: *Jenkins v. Green* ⁽³⁾; *Lord J. Stewart v. London and North Western Railway Company* ⁽⁴⁾; *Liddy v. Kennedy* ⁽⁵⁾.

⁽¹⁾ 2 J. & H., 746.⁽⁴⁾ 1 D. M. & G., 721.⁽²⁾ 11 Beav., 497; 2 H. & Tw., 327.⁽⁵⁾ Law Rep., 5 H. L., 134.⁽³⁾ 27 Beav., 437.

If, however, the court should consider that the contract cannot be specifically performed, and that the bill must be dismissed, at any rate, as the defendant might have raised the defence by demurrer, the plaintiff ought not to pay the full costs up to the hearing.

Mr. *Chitty*, Q.C., and Mr. *Simmonds*, for the defendant, were not called on.

SIR G. JESSEL, M.R.: I am of opinion that this contract cannot be enforced. It may be said that the court takes a strict view of these contracts; but if a plaintiff seeks specific performance, he must take the contract as it is made, and it must be construed strictly.

The present contract is one which cannot be carried out by conveyance; and that being so, I do not see how the court can alter it and make a new contract which can be carried out by conveyance. By the contract the vendor agrees to sell certain land, but "reserves the necessary land for making a railway through the estate to Prince Town." If the conveyance were executed in this form, it is obvious, according to the present law, the whole land would pass to the purchaser, the reservation being void for uncertainty. But this is not the intention of the parties, for the vendor intended to reserve a substantial part of the estate. The 494] *contract does not show what that is. I neither know what is the amount of land necessary for a railway, nor what line the railway is to take, nor anything about it, and, therefore, I cannot enforce specific performance of the contract. It is urged on the part of the plaintiff that the defendant might have demurred, and not having done so, is only entitled to such costs as he would have had in case he had demurred, and not to have the costs of the whole proceedings paid by the plaintiff. It seems to me, however, that the same principle ought to apply to a suit in this court as to an action at common law. In an action at law a defendant may object to the form of the declaration although all the witnesses are summoned, and if the objection be sustained, may sign judgment and have the whole of the costs. This ought to be the rule here, and in fact was held to be the rule by the Lords Justices in the recent case of *Bush v. Trowbridge Waterworks Company* ('). The bill must be dismissed with costs.

Solicitors for the plaintiff: Messrs. *Coode, Kingdon & Cotton*, agents for Mr. *E. Chilcott, Tavistock*.

Solicitor for the defendant: Mr. *S. B. Somerville*, agent for Messrs. *W. & E. P. Burd, Okchampton*.

(') Law Rep., 10 Ch., 459.

[Law Reports, 20 Equity Cases, 494.]

M.R., June 9, 1875.

HACKETT V. BAISS.

[1875 H. 110.]

Ancient Lights—Injunction—Angle of 45°.

Where a building was being erected in a somewhat narrow street in the city of London, and had already reached a height which would subtend an angle of 45° at the foot of the ancient lights of the plaintiff's houses on the opposite side of the street:

Held, that the plaintiff was entitled to an injunction restraining the raising the new building to a greater height.

THIS was a suit to restrain the defendants from building a warehouse of such a height as to interfere with the access of light and air to the plaintiff's premises.

*The plaintiff in this case was the owner of certain [495 messuages in Jewry Street in the city of London, the owners and occupiers of which had had uninterrupted enjoyment of light and air for above twenty years. In two of the houses the plaintiff carried on business as a wholesale furniture manufacturer, with a shop and shop-front, and show-rooms upstairs. The other houses were let for business purposes. The greatest width of the street was 38 ft. 6 in., and at some parts it was only 34 feet wide. The foot of the plaintiff's ground-floor windows was 5 feet above the ground, the centre of the windows 3 feet higher; the average height of the bottoms of his first-floor windows was 16 feet above the ground, and the average height of his houses was 45 feet. The road on that side of the street was one foot higher than on the opposite side.

The defendants were erecting a warehouse opposite to the plaintiff's premises on the site of some old buildings, part of which only subtended an angle of 38°, and other part an angle of 27° above the horizon at the centre point of the ground-floor windows of the plaintiff's houses. The defendants desired to build their warehouse 52 feet high, and had carried it up to the height of 46 feet when the bill was filed.

The bill prayed that the defendants, their agents, servants and workmen, might be restrained by injunction until the hearing of the cause, and thenceforth perpetually, from further raising the said erection, or permitting it to remain at a greater height than the buildings which formerly stood on the same site, or at such height as might obstruct or diminish such access or use of light to the plaintiff's mes-

suages as was enjoyed before the old buildings were pulled down.

An *interim* injunction had been obtained, and the cause now came on for hearing, with the usual scientific evidence on both sides.

It appeared that the height to which the building was already raised subtended an angle of rather more than 45° at the foot of the plaintiff's ancient lights.

Mr. *Fischer*, Q.C., and Mr. *Henderson*, for the plaintiff, contended that he was entitled to an injunction restraining any further elevation of the walls of the new building, but they did not ask for a mandatory injunction in order that 496] the defendants might be *compelled to pull down their building to the height of 44 feet, which would preserve the access of light at the angle of 45°.

Mr. *Chitty*, Q.C., and Mr. *Tyssen*, for the defendants: There is no reported case in which the right to light has been carried to the extent contended for here. The nearest case is *Yates v. Jack* (*), where the distance was 31 feet and the height of the proposed building 67 feet.

The Prescription Act (2 & 3 Will. 4, c. 71) does not give an owner any further right than the common law. It has not altered the nature of the easement, but only its mode of proof. It was supposed for some time that the act gave an indefeasible right to every inch of sky, but that was held to be erroneous in *Kelk v. Pearson* (*), and again in *City of London Brewery Company v. Tennant* (*). The Lord Justice James there says: "The extent of the right of an owner of ancient lights is to prevent his neighbor from building so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable, that is to say, that he is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop or other place of business."

On this principle an injunction was refused in *Clarke v. Clark* (*), although the sunshine was reduced in winter from 2½ hrs. to 40'; and in *Robson v. Whittingham* (*), where the distance was 15 feet, the building to the west, as here, the old buildings in part 30 feet high, and in part 14 feet, and the new buildings 36 feet throughout. There was also evidence there of the gas having to be lighted earlier, and a

(*) Law Rep., 1 Ch., 295.

(*) Law Rep., 1 Ch., 16.

(*) Ibid., 6 Ch., 809.

(*) Ibid., 442.

(*) Ibid., 9 Ch., 212, 216.

table having to be moved. The case was much stronger in favor of the plaintiff than the present case. An injunction was also refused in *Durell v. Pritchard*⁽¹⁾, where the distance was 10 feet, the old buildings 13 ft. 6 in. high, and the new ones 20 feet, and the building to the west.

*Even if we do interfere to some slight extent with [497 the plaintiff's light and air, we submit that the damage is so trivial that the court will not grant an injunction, but only inquire into the amount of damage in accordance with the principles laid down by your honor in *Aynsley v. Glover*⁽²⁾.

SIR G. JESSEL, M.R.: I have no doubt in this case as to what I ought to do, having regard to the law of the court. In the first place, the building of which complaint is made is not completed, and although some complaint is made as regards the building up to its present height, yet, as it is only a question of 1 foot or 1½ feet between the present height of 46 feet and the height to which the building ought to go in order to preserve the access of light at an angle of 45°, which would probably be 44 feet, or thereabouts, the counsel for the plaintiff did not ask me to grant a mandatory injunction in order to make the defendants pull down to that difference. Therefore, I am entitled to treat this question as if I were deciding the question as to a building leaving the access of light still to the defendant's houses at an angle not greater than 45°. Speaking of that, I do not think with a completed building that the mere fact of its being a few inches too high would have induced the court to grant a mandatory injunction, even if the plaintiff's counsel had not waived it.

The real question I have to decide is this: In a street a good deal narrower than ordinary streets, not being more than 38 ft. 6 in. at any part across, and at other parts only 34 feet, is a building owner entitled to erect a building to a height which will obstruct the access of light below the 45° angle? I say that, as a general rule, he is not. In cases of this kind, positive evidence being unobtainable, because the building is not erected, you must go upon theory, and that theory of course must be the opinion of skilled persons—persons who have paid attention to the effect of buildings on light. But on this point the court is not left to guess or to arrive at an arbitrary conclusion upon the evidence of witnesses, because, in the first place, the point has been considered by the Legislature, and after

(1) Law Rep., 1 Ch., 244.

(2) Law Rep., 18 Eq., 544, 554.

498] considering the result of *professional opinions, the Legislature has adopted the angle of 45° as the proper angle below which the incidence of light ought not to be permitted to fall in the case of buildings on the opposite side of an ordinary street; and that view has been sanctioned by the court whose decisions are binding upon me, even if I differed from them, which I do not. I refer to the case of *City of London Brewery Company v. Tennant*⁽¹⁾, where the judgment contains these words: "Further, with regard to the forty-five degrees, there is no positive rule of law upon that subject; the circumstance that forty-five degrees are left unobstructed being merely an element in the question of fact, whether the access of light is unduly interfered with; but undoubtedly there is ground for saying that if the Legislature, when making general regulations as to buildings, considered that when new buildings are erected, the light sufficient for the comfortable occupation of them will, as a general rule, be obtained if the buildings to be erected opposite to them have not a greater angular elevation than forty-five degrees, the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered *prima facie* evidence that there is not likely to be material injury."

So that, on being satisfied that 45° are unobstructed, I ought, *prima facie*, to come to that conclusion, unless there is something special in the case.

Now, what is special in this case is in favor of the plaintiff. In the first place, as I have said, the street is rather narrower than it ought to be. The Legislative rule applies to a street of the ordinary width. In the next place, there is some positive evidence that the present height of 46 feet, a little over the 45°, has interfered with the access of light not to an inconsiderable extent, and has actually caused personal inconvenience to one of the occupiers of the houses. I do not say that that alone would be conclusive. I cordially assent, if my assent were necessary, which it is not, to the remarks made by Lord Cranworth in the case of *Yates v. Jack*⁽²⁾. I think it is no answer to say, because for sampling in some businesses it is better that the direct rays of the sun should not enter into the room, that therefore you may deprive a man of the blessing and comfort of 499] the entry of the *direct rays of the sun. If he does not like the sun entering when he is going to sample, he can pull down his blind, or otherwise regulate the access of light. There are other times of the day when his room

(1) Law Rep., 9 Ch., 220.

(2) Law Rep., 1 Ch., 295.

would be more cheerful, more comfortable, and more enjoyable with the sunshine, especially in a city like London, where we do not see quite so much as we should like of the direct rays of the sun. That is no answer at all. It is not conclusive upon the point, and, so far as it goes, is in favor of the plaintiff. That being so, I shall grant an injunction.

It is a very serious matter to decide what the terms of it ought to be. I have sent for the order in *Yates v. Jack* (¹), which I have read. It is not necessary that the whole subject-matter in dispute should be fought out in a most inconvenient and disagreeable form upon a formal motion to commit the defendants for breach of the injunction. Nothing, in my opinion, can be more undesirable; but, at the same time, it is impossible for the court to say beforehand what kind of building would obstruct the light. The defendants may wish to alter their plans, and if they do so wish, the court, *a priori*, cannot say whether the plans when altered will or will not be objectionable to the plaintiff; therefore in that case the court has no alternative.

It has, therefore, been my habit to ask the defendant what form of injunction he prefers; and I believe in every case the answer has been the same as Mr. Chitty has given to day, namely, that he prefers an order which tells him exactly what he is not to do. I will grant an injunction to restrain the defendants from erecting the new building at a greater height than 46 feet from the pavement or base line. This, however, is not to prevent the defendants from making a sloping roof of a greater height, so long as the angle of incidence of light over the roof to the centre of the ground-floor windows of the plaintiff's houses does not exceed 45°.

Solicitors for the plaintiff: Messrs. *Glynnes & Co.*

Solicitors for the defendants: Messrs. *Nicholson, Nicol & Co.*

(¹) Law Rep., 1 Ch., 295.

[Law Reports, 20 Equity Cases, 511.]

M.R., June 24, 1875.

*SMITH V. PETERS.

[511]

[1875 S. 146.]

Vendor and Purchaser—Agreement for Sale of Fixtures at Valuation by Person named—Specific Performance—Interlocutory Application—Mandatory Order

Where an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein at a valuation by a person named by both

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parties, and he undertakes the valuation, but if refused permission by the vendor to enter the premises for that purpose, the court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed.

The court has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing.

THIS was a motion made in a suit for the specific performance of an agreement entered into by the defendant, Miles Peters, a licensed victualler, and owner of a leasehold public house known as The Yorkshire Stingo Tavern, for the assignment to the plaintiff of the said premises, and of the good-will of the business there carried on.

By the agreement, dated the 26th of April, 1875, and signed by the defendant, the vendor, and the purchaser, who was agent for the plaintiff, in consideration of £500 deposit money, and the further sum of £10,200, the defendant agreed to assign to the purchaser the lease of the said premises and the good-will thereof, and the purchaser agreed to purchase, at a fair valuation to be made by Mr. Lound, 512] who was nominated by the parties thereto, *such part of the household furniture, fixtures, and other effects then on the premises as the defendant might have a right to sell.

The bill alleged that Mr. Lound and his clerks had, in pursuance of the agreement, commenced taking the inventory, but that the defendant refused to permit him to complete it, or to proceed with his valuation, intimating that he did not intend to complete the agreement.

The bill was accordingly filed on the 4th of June, praying that the agreement might be specifically performed, and that the defendant might be ordered to permit Lound at all seasonable times to enter into the premises for the purpose of inspecting and making an inventory of the said furniture, fixtures, and other effects.

A motion was now made on behalf of the plaintiff for an interim order on the defendant to permit the said John Lound, or his clerks, at all seasonable times, and on proper notice being given, to enter upon the premises for the purpose of inspecting and making the said inventory. Evidence was adduced in support of the plaintiff's case, but no affidavit was filed by the defendant in reply.

Mr. Chitty, Q.C., and Mr. Daniel Jones, for the plaintiff, in support of the motion, cited *Kynaston v. East India Company* (').

Mr. Waller, Q.C., and Mr. Begg, for the defendant, contended that it was contrary to the practice of the court to make a mandatory order of this nature on an interlocutory

(') 3 Sw., 248.

application before the hearing of the cause. In this case there was only an incomplete contract, which the court could not compel the defendant specifically to perform: *Milnes v. Gery*(¹); *Darbey v. Whitaker*(²); *Jackson v. Jackson*(³); *Richardson v. Smith*(⁴); *Clarke v. Maokintosh*(⁵).

Mr. Chitty, in reply, referred to *Vickers v. Vickers*(⁶).

SIR G. JESSEL, M.R.: The first question that I have to consider is, whether this *application is in accordance [513 with the practice of the court. I have no hesitation in saying that there is no limit to the practice of the court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause. I know of no other limit. Whether they are or are not to be granted must of course depend upon the special circumstances of the case. But if authority were wanting for my guidance in this matter—and I think the principle is so clear that authority is not wanting—I might refer to the case which has been mentioned by the plaintiff's counsel, of *Kynaston v. East India Company*(⁷), which was an application in a tithe suit to inspect the defendant's house before the hearing, in order to ascertain its value. The object in ascertaining its value would be to make a decree against the defendant at the hearing. Here the object of ascertaining the value is also to make a decree against the defendant at the hearing. What does Lord Eldon say? "I have found no case in point, but on principle I think the court has authority." Therefore, in deciding the question of practice, he only looked at the principle. That is what I am going to do.

In the present case there was an agreement for the sale of a public house, and the fixtures, furniture, and other effects. There is no evidence that the value of the fixtures and furniture was so large as to be an essential portion of the contract. It was agreed that such part of the household furniture, fixtures, and other effects as the defendant could dispose of should be taken at a valuation to be made by Mr. Lound, who is a valuer appointed by both parties. If this were the hearing of the cause, Mr. Lound being ready to make the valuation, I see no reason why a decree for

(¹) 14 Ves., 400.

(²) 4 Drew., 184.

(³) 1 Sm. & Giff., 184.

(⁴) Law Rep., 5 Ch., 648.

(⁵) 4 Giff., 184.

(⁶) Law Rep., 4 Eq., 529.

(⁷) 3 Sw., 248.

specific performance should not be made, and the subsidiary matter, namely, the completion of the valuation, be proceeded with afterwards. The contract could then be completed within sufficient time.

The defendant has adduced no evidence in defence of his conduct; he has obstructed Mr. Lound in the performance of the duty which he has agreed that he should perform. Can it be tolerated, in a country in which violence is not 514] allowed, in which *Mr. Lound and his clerks would not be permitted to force an entry, although in pursuance of an agreement, that a court of justice shall say no provision can be found for such a case, and that it shall be permitted to a defendant to say, "Although I have sold this furniture and fixtures at a valuation to be made by Mr. Lound, a valuer of my own choice, I will at my will and pleasure obstruct Mr. Lound in the performance of his duty, and prevent his completing the valuation which I have already contracted he shall make?" I do not believe it to be the law of this court, and I do not believe it will ever be so decided.

Again, if authority be wanting to confirm what I have said, I think there is such authority to be found in the case of *Vickers v. Vickers* ('). Sir W. Page Wood, V.C., says this: "The court has adopted this principle"—that is, the principle of not enforcing sales by valuation to be made—" (I am not sure that it has not extended it) from the civil law as stated in the Code of Justinian, who seems to have taken great pride in having decided a point, which he said was a knotty point, and had occasioned great controversy among lawyers, namely, if a given man is to name the price, whether that is to be considered as equivalent to the *arbitrium boni viri*. The Emperor Justinian (Inst. 3, 24, 1; Cod. 4, 38, 15) determined that if Titius be unable or unwilling to name the price, the sale is null. But he does not say that if one of the parties to such an engagement were to throw any obstacle in the way and avail himself of what, in ordinary cases, we should call his own wrong, the court would still hold the same view, and that a substitution could not be made in order to give effect to the *bona fides* of the contract." When he says "he does not say," I consider the learned Vice-Chancellor to have meant that he would so have decided. Certainly I shall so decide, and order that Lound be permitted to enter the premises for the purposes mentioned in the notice of motion on giving twenty-four hours'

(') Law Rep., 4 Eq., 535.

notice, the inspection to be limited to two working days between the hours of ten and six.

Solicitors for the plaintiff: Messrs. *Stileman & Neate*.

Solicitors for the defendant: Messrs. *Mackeson, Taylor & Arnould*.

[Law Reports, 20 Equity Cases, 515.]

M.R., June 26, 1875.

*MIDDLETON V. POLLOCK.

[515]

[1873 M. 204.]

Ex parte KNIGHT AND RAYMOND.

Equitable Set-off—Debt to Joint Creditors contracted by Fraud—Separate Debt due from one of Joint Creditors.

There is no rule that a debt due to joint creditors, which has been contracted by fraud, can be set off against a separate debt due from one of the joint creditors.

Ex parte Stephens ⁽¹⁾ and *Vulliamy v. Noble* ⁽²⁾ explained.

P., the solicitor of K. and R. (who were trustees of a marriage settlement), received on their behalf the sum of £4,000, and represented that he had invested the whole of it on mortgage. He did invest on mortgage two sums of £2,200 and £850, part thereof; but he never invested the balance of £950. The debt of £2,200 was (with the knowledge of K. and R.) paid off and received by P., and retained by him for reinvestment; but no reinvestment was ever made. P. died insolvent:

Held, that neither of the sums of £2,200 and £950 due from his estate could be set off against a separate debt due to the estate from K.

THIS was a creditor's suit for the administration of the estate of Alfred Atkinson Pollock, a solicitor, who died on the 10th of August, 1873. His estate had proved to be insolvent.

Mr. Pollock acted as solicitor for Messrs. Charles Raleigh Knight and George Raymond, the trustees of a settlement, made on the marriage of Mr. and Mrs. Spring. Part of the trust property consisted of a sum of £10,000 secured by a mortgage on certain real estate belonging to Mr. Spring.

In 1867 Mr. Spring sold this estate, and it was arranged that the mortgage debt of £10,000 should be paid off out of the proceeds of sale, and should be received by Mr. Pollock on behalf of the trustees; and he accordingly received that sum on the 31st of December, 1867. He afterwards represented that he had, on the 29th of January, 1868, advanced £4,000, part of that sum, to a Mr. Rabbits, a builder, on the security of a mortgage of property at Sutton.

It now appeared no mortgage was given until the 19th of *August, 1868, on which day Rabbits executed two [516 mortgages to Messrs. Knight and Raymond, one for securing £850, and the other for securing £2,200. The remaining

(1) 11 Ves., 24.

(2) 8 Mer., 593.

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£950 was never advanced to Rabbits at all, nor was any mortgage given for it; but Pollock, in his books, debited Rabbits with £4,000, and credited him from time to time with the interest of £950.

In December, 1872, Pollock wrote a letter to Mr. Knight, stating that the property on which the sum of £2,200 lent to Mr. Rabbits was secured had been sold, that he would readily be able to obtain another security for £2,200, and that Mr. Rabbits would still remain liable for the interest at 5 per cent. on the £2,200 until a new security was found. Mr. Knight, upon the representations contained in this letter (although he had believed that the £4,000 had been advanced in one sum), executed a reconveyance of the property; and Mr. Raymond afterwards did the same. Pollock received the £2,200 when paid off, but never made any reinvestment thereof.

From June, 1868, down to June, 1873, Pollock regularly paid to Mr. Spring interest at 5 per cent. on the £4,000, but at his death the only security for any part of the trust fund which was found to be forthcoming was the mortgage for £850.

Mr. Knight was at the time of Pollock's death indebted to him in the sum of £2,014 7s. 5d. in respect of payments which had been made by Pollock on Mr. Knight's behalf. A summons was taken out in the suit by Messrs. Knight and Raymond, asking that Mr. Knight might be at liberty to retain the amount due from him to Pollock's estate in part satisfaction of the sum of £3,150 found due from his estate to Messrs. Knight and Raymond as trustees of Mr. and Mrs. Spring's marriage settlement. This summons was adjourned into court, and now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *Wolstenholme*, for Messrs. Knight and Raymond: Where a debtor, by fraudulent conduct, prevents a party from making a claim to which he is justly entitled, equity allows that party a right of set-off, even of a debt owing by him jointly with another person: *Ex parte Stephens* ⁽¹⁾; *Vulliamy v. 517 Noble* ⁽²⁾; **Ex parte Hanson* ⁽³⁾. Here Pollock falsely represented to Messrs. Knight and Raymond that the trust fund belonging to them was invested on mortgage; by those representations they were prevented from taking any proceedings against Pollock, and his representative cannot sue Knight without allowing a set-off in respect of the debt due to him and Raymond jointly. If in

⁽¹⁾ 11 Ves., 24.

⁽²⁾ 12 Ves., 346; 18 Ves., 232.

⁽³⁾ 3 Mer., 593, 621.

the lifetime of Pollock, Knight had discovered the true state of facts, he might have appropriated the debt due from him to the £3,150 due to the trust estate, or he might, by investing £4,000 in the joint names of himself and his co-trustee, have acquired the right to sue Pollock; and the cases cited show that it makes no difference that he has not made such an investment, if (as was the case) he was prevented from discovering the truth by Pollock's misrepresentations.

Mr. *Fry*, Q.C., and Mr. *Romer*, for the plaintiff.

Mr. *W. Barber*, for the defendant.

SIR G. JESSEL, M.R.: This case divides itself into two distinct portions, with which I will deal separately. The whole sum of £4,000 was represented by Mr. Pollock as having been advanced to Mr. Rabbits on mortgage. This was not the case as to £950; but the balance was advanced to Mr. Rabbits. Of that balance £2,200 was paid off, and Mr. Pollock was allowed to retain that sum with a view of finding another investment. I cannot see the slightest claim in respect of the £2,200, and that portion of the case may be dismissed altogether. As regards that sum, there was no fraud: it was advanced, it was paid off, and the trustees knew of it.

The real question is as to the £950, which Mr. Pollock seems to have dealt with in this way. He seems to have arranged with Mr. Rabbits to make an advance of the whole £4,000, but Mr. Rabbits, who was building some houses, had not got the security ready, and therefore, instead of telling his clients that he had not advanced £950, he debited Mr. Rabbits in his book with £4,000 advanced on mortgage, and credited him with interest on the £950. *This [518 was a wholly irregular transaction; but, although I much regret to say that in other cases I have not been able to exonerate Mr. Pollock from intentional fraud, in this case I do not think there was intentional fraud on his part, although the legal consequences may be the same. It is clear he represented to his clients that the whole sum was really invested on mortgage when it was not, and as the clients deny they had notice to the contrary, I must take it they were kept in ignorance of the real nature of the transaction. Whatever Mr. Pollock's motives may have been, the £950 remained in his hands in consequence of misrepresentations by him which would entitle the clients to say the debt was incurred, so far as he was concerned, by fraud.

The question I have to consider is whether that entitles the clients to say that that sum of £950 shall be set off against a sum of £2,014 due from Knight, one of the trus-

tees, in respect of an advance to him on his own private individual account.

Now, in the first place, Pollock had notice of the trust; he, therefore, knew that he could not properly pay £950, part of the trust fund, to Knight alone, passing over the other trustee. Consequently it is impossible to appropriate £950, part of the £2,014, as payment to Knight on account of Knight and Raymond. Payment is out of the question. But it was said that inasmuch as the debt of £950 was contracted by fraud, that Knight would have a right to say, "If I had known the truth of the case I would have appropriated part of the £2,014 to make good the £950." I am not aware of any such right. As far as I know, all that could have been done would have been for Knight and Raymond to sue Mr. Pollock to recover that money. I do not know of any right to set off as against the joint demand the several debt of one of the joint creditors. There is no such set-off either in law or equity.

But then it was said that there is authority to show that if the debt sought to be set off was contracted by fraud a different rule prevails; that, although the separate debt of one of the joint creditors was not contracted by fraud you can set off that against the debt of the joint creditors which was contracted by fraud. It is difficult to see on principle how you can be in a better position than if you had known 519] the facts; and if the facts had been *known, there could be no such set-off. The decisions of Lord Eldon on the subject do not bear out the proposition at all. *Ex parte Stephens* (1) was the first case. The facts of that case are very plain. Castell and Powell were bankers. Miss Stephens was their customer. She directed them to sell some exchequer annuities and invest the proceeds in 5 per cent. navy annuities. They did sell the exchequer annuities, and they told her they had bought the navy annuities. However, instead of buying the annuities they kept the proceeds, being £3,320 11s. 11d., in their pockets. They regularly paid her the dividends until they became bankrupt. In the meantime, her brother, James Stephens, being a customer of the same bankers, borrowed from them £1,000 on the security of the joint and several note of himself and his sister, so that the brother was the principal debtor to the knowledge of the bankers, the sister joining as his surety to their knowledge, and becoming liable on a joint and several note. The bankers became bankrupt, and thereupon the assignee brought an action against the brother to recover the

(1) 11 Ves., 24.

£1,000. A petition was presented by him and the sister, praying that they might set off what was due upon the note from the debt due from the bankrupts to Ann Stephens, and that she might prove for the residue; and that was the order made. What was the reason for the order? The Lord Chancellor says⁽¹⁾: "The question upon the petition is treated as a question of set-off. But it is not here raised as a question of set-off in the strict and technical sense. The question upon the whole is, whether the Chancellor, exercising the jurisdiction in bankruptcy, namely, both a legal and equitable jurisdiction, can interpose against an action brought by the assignees, not against Miss Stephens, but against her brother, upon his note as a several promissory note." Then he says further on: "But in this case my ground is that the contract was entered into by Miss Stephens in ignorance." That is the first ground, namely, that she became surety for her brother in ignorance of the fact of the bankers having committed the fraud, and on that ground he would have set aside the suretyship, but it was not necessary to decide on that ground, for he says: "And if not, I should make the same construction; for if they had her money in their hands, as *she was upon [520 the face of the instrument a surety, it was against conscience to do any act as against her which should prevent her having what was no more than the proper use of her own money"—the proper use being to pay the several promissory note—"retaining her right to proceed against the person for her reimbursement as far as she fairly could"—that person being the brother—"and it was competent to her if she had made the discovery immediately after the transaction on account of her brother, to have desired that so much of the debt should be cancelled and the difference paid." That means the debt due by her cancelled, and the difference paid to her—to set off the several debt due by her on the promissory note against so much of the several debt due by the bankers to her by reason of the sale of the annuities. Then his Lordship says that she might also have said: "She had a demand against her brother for the sum of £1,000 as paid to his use; also upon the statute of mutual debts and credits: and they shall not be permitted to say she shall not, if she chooses, pay the debt, when the consequence is that she loses her money, and they can call upon him. If she had this equity before the bankruptcy, so she has it afterwards, and therefore she has a clear right to say they shall hold £1,000 of her money in

(¹) 11 Ves., 26, 27, 28.

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discharge of the note, and shall deliver up the note. The consequence is they are prevented from suing upon the note by the clear demand of justice she has against them, and therefore they have no right to complain." It appears to me that that is, if I may say so, a very sensible and clear equity. If she had not by fraud been kept in ignorance of the facts, she would have known that the bankers had a £3,000 debt due to her, and that she owed them £1,000 on the promissory note, and she would have said to them, "Set one against the other, and pay as much of the balance as you can;" and in that case she would have paid £1,000 as the surety, and would have had a right to sue the brother from time to time, and to stand in the place of the bankers as his creditor. After the bankruptcy the assignees could be in no better position: they only took what the bankrupts were entitled to, and they could not have been allowed to say, "You had no right of set-off before action brought," because it was their own fraud which prevented her knowing the facts which gave rise to the right of set-off. But the 521] right of set-off *was indisputable. There was a several demand on the one side and on the other; and therefore the only relief that she got was relief against the neglect to assert that right in due time, which was not really neglect, but rather omission—caused by the fraudulent concealment by the bankers of the true facts of the case; and neither they nor their assignees could take advantage of their fraudulent concealment to deprive her of that right of set-off. That is all that *Ex parte Stephens* (') decides.

The other case was *Vulliamy v. Noble* ('), which was shortly this: Vulliamy, the father, as a security to his bankers for a separate debt due from him, had transferred to the bankers £8,700 4 per Cent. Bank Annuities, and £1,425 3 per Cent. Bank Annuities; in round figures, £10,000 Bank Annuities. He afterwards paid off part of that separate debt, but he and his sons had previously borrowed some more money on their joint notes. Finally the whole of the separate debt was paid off, but the stock was not retransferred. The bill alleged that it ought to have been retransferred, "but the same being considered by the banking house to remain in Noble's name" (that is in the name of one of the bankers) "as a collateral security for the money advanced to both plaintiffs on their joint notes, and the plaintiff Vulliamy, the father, having a high opinion of the honor and solvency of the house, he (the said plaintiff) did

(') 11 Ves., 24.

(') 3 Mer., 593.

not require a retransfer." In other words, the stock was retained by the banking house as security, with the assent of the owner, for the repayment of the money secured by the joint notes. The answer took the same view as the bill, because the defendants "admitted that no part of the stock transferred by the plaintiff to Noble had ever been retransferred to the plaintiff; and Noble said that the reason why that sum had not been retransferred during the solvency of the house, was because the plaintiff had always remained indebted to the house during that time." So that they both agreed it was kept as security for the payment of the joint notes. That being so, the bankers sold the stock unknown to the plaintiff, and kept the money; the result of which was that the bankers became indebted to the plaintiff, not for the sum the stock produced, but that sum minus the amount due on the joint notes. If bankers, having the *security of the stock to pay the joint notes when they [522 become due, sell the stock, in equity they are only liable to account for the balance; that is, they ought to have appropriated the proceeds of the stock first to pay off the debt due to themselves, and then to have handed over the balance due to the person depositing the stock. Strictly speaking, perhaps, they ought not to have sold more stock than was necessary for that purpose. In either way the bankers would owe nothing in respect of so much of the amount of the proceeds of the stock as was equivalent to the debt due to themselves, and that is all that was decided in *Vulliamy v. Noble* ('). All the plaintiff got was what was called (although inaccurately) a set-off; that is, he owing them money on the joint notes, was not to pay the money, but it was considered to have been paid *pro tanto* by the sale of the stock, and in that way he had a right to insist in equity that persons who had security should dispose of that security in the proper way, namely, by applying the proceeds in payment of the mortgage debt, if you may so call it; and they could not say because they sold it too early that the equity did not apply. That is the whole effect of the decision. No doubt in the final judgment of the Lord Chancellor it was called an equitable set-off, but this was said in the course of the argument by the Lord Chancellor ('): "There is a difficulty as to the joint note of father and son. What is the evidence of there having been an agreement that this stock should be held as a security for the joint debt?" The answer is, "That evidence is to be found in the nature and in the continuance

(1) 3 Mer., 593.

(2) 3 Mer., 612.

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of the transaction, and when all circumstances are taken together, and coupled with the fact that no retransfer was called for, and the books being attended to in which both Vulliamys, father and son, are credited, and the accounts made up according to this course of dealing and mutual understanding between the parties, it is impossible not to infer an intention that the stock of Vulliamy should remain a security for all the notes, both his own separate notes and the joint note of himself and his son." Having made that observation during the course of the argument, and getting that answer, then in the final judgment he refers to the case of *Ex parte Stephens* (¹), and says: "There the 523] sister of a person who was debtor *to the banking house gave her personal undertaking for the debt of her brother, being at the time ignorant that the bankers had money of hers in their hands, for which they were accountable, and which she prayed by her petition might be set off against that particular debt. That is precisely the present case. You are right, therefore, on this point as to the set-off, and must have your costs." That is the whole judgment. Therefore, the reason for the judgment was that he held it as security for the joint debt, and not set-off properly so called, but the application of the proceeds of the security for the payment off of the debt for which security was given. In that way there is no difficulty in the case, although it would have been more satisfactory if the observations made in the argument had been repeated in the judgment.

Now the present case is simply this: £950 is due to Knight and Raymond on a joint account as trustees. That being so due, £2,000 is advanced to Knight on his private account. In no sense and in no way can that be a payment to Knight on account of Knight and Raymond, and in no sense could Knight have had the right to set that off if he had known all the facts, because he could not, as trustee, receive the trust money. The only suggestion that was made was this—that if he had known the facts, he might have replaced the amount in the names of Knight and Raymond. That is too remote for me to consider, especially having regard to these circumstances, namely, that he did know of the £2,200 being in the hands of Mr. Pollock for investment, and having that high opinion of him which was entertained at the time by all his clients (and without which it would be impossible that any man could commit these frauds), he did not pay off the £2,200, or take proceedings against Mr.

(¹) 11 Ves., 24.

Pollock, and therefore it is quite certain that if he had been told of the actual fact that Pollock was keeping it to see whether he could advance it to Rabbits on security or otherwise, he would not have paid it off or transferred the amount. I am of opinion, therefore, that the case of equitable retainer or equitable set-off fails.

Solicitors: Messrs. *Domville, Lawrence & Graham*; Messrs. *Farrer, Ouwry & Co.*; Messrs. *Ridsdale, Craddock & Ridsdale*.

[Law Reports, 20 Equity Cases, 539.]

M.R., July 13, 1875.

*JONES V. CHAPPELL.

[539

[1875 J. 7.]

Lessor and Lessee—Waste—Injunction—Nuisance—Weekly Tenant.

The lessee of land who erects a building thereon without the consent of his lessor does not commit waste within the definition in Co. Lit. 53 a, unless it can be shown that such building is an injury to the inheritance.

The owner or lessee of houses let or sublet to weekly tenants cannot maintain a suit to restrain a temporary nuisance, such as the noise of machinery in adjacent premises, but

Semble, such a suit could be maintained by a weekly tenant if the nuisance were of such a nature as to be injurious to his health or comfort.

THE plaintiff was the lessee of two houses in Effingham Street under two leases, dated respectively the 19th of May and the 8th of June, 1863, granted by the trustees of the will of Thomas Cubitt. The rooms in these houses were let out to weekly tenants.

These houses at their back adjoined a piece of vacant land from which they were divided by a low wall, and the windows at the back had, at the time of the demise and also shortly before the filing of the bill, free access of light and air. The adjacent piece of land had, by a lease dated the 16th of December, 1852, and granted by the said Thomas Cubitt, been demised to James Smith for the term of eighty-five years and three-quarters. The lease contained a covenant by the lessee to keep all future buildings and erections in repair, and also not to erect any steam engine on the premises, or commit or do anything which might be a nuisance or annoyance to the tenant or occupier of any messuage or premises near to the premises thereby demised.

The bill alleged that the defendant, who was assignee of the lease of the last-mentioned premises by an assignment subsequent to the plaintiff's lease, had lately erected steam

engines and stone saw mills, and other machinery thereon, and that the noise, steam and smoke arising from the working of the machinery were a nuisance, and caused great damage to the plaintiff and his under-tenants, and that the nuisance arising from the works had been so great that several of the plaintiff's tenants had left his houses, and the value thereof had been seriously depreciated.

540] *The bill also alleged that the defendant had erected a staging to carry a travelling crane close to the plaintiff's windows, which obstructed the light that formerly came through the back windows of the plaintiff's houses, and was erecting a wall at a distance of only eight feet opposite to the said windows, which obstructed the access of light and air, and rendered the rooms lighted by the back windows nearly uninhabitable.

The plaintiff charged that he was entitled under his leases to enjoy the access of light and air through the said back windows, and that, as the defendant claimed to be entitled to the land at the back of the plaintiff's premises under a lease granted by the plaintiff's lessors, he was not entitled to obstruct the light and air coming to the plaintiff's premises.

The bill prayed that the defendant might be restrained by injunction from sawing any stone or other material, and from working any machinery upon, and from causing any smoke or steam to be emitted from, and from carrying on any works or business upon the land at the back of the plaintiff's houses, so as to cause any damage or annoyance to the plaintiff or his tenants; and (secondly) that the defendant might be restrained from permitting the wall and staging erected by him to remain erected so as to diminish the access of light and air to the windows at the back of the plaintiff's houses.

Mr. *Chitty*, Q.C., and Mr. *Jason Smith*, for the plaintiff: In this case, although the windows where light is obstructed by the defendant's buildings are not ancient lights, yet, as the assignment to the defendant was subsequent to the plaintiff's lease, he cannot be permitted under such assignment to injure the plaintiff's houses, as they both hold under the same landlord, who cannot derogate from his own grant.

Besides, the defendant, as lessee, had no right to erect these buildings on the vacant land. The law is thus laid down by Coke ('): "If the tenant build a new house it is waste."

(') Co. Litt., 53 a.

[The MASTER OF THE ROLLS: That is not the law at the present time. In Williams' Notes on Saunders ⁽¹⁾ it is said: "It is a question whether it is waste to build a *new* house." In **Lord Darcy v. Ashworth* ⁽²⁾ the law is [541 thus stated: "A lessee may build a new house where none was before;" and thus in *Doe v. Earl of Burlington* ⁽³⁾: "Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or secondly, by increasing the burthen upon it, or thirdly, by impairing the evidence of title. And this law is distinctly laid down by Chief Justice Richardson in *Barret v. Barret*" ⁽⁴⁾.]

As regards the question of nuisance, the evidence clearly shows that it is such as the court will restrain, even though the plaintiff is not the occupier of the houses, as its permanent value will be diminished. It appears that the plaintiff's houses were let to weekly tenants, who are not in a position to file a bill in this court; therefore, unless the plaintiff can obtain an injunction, there will be no remedy whatsoever. The bill, therefore, is properly framed, and a sufficient case is made out to call for the interference of the court.

Mr. Southgate, Q.C., and Mr. Macnaghten, for the defendant.

SIR G. JESSEL, M.R.: I am satisfied this bill cannot be maintained. First, as regards the lights. The windows are not ancient lights, and as the lease under which the defendant claims is prior in date to the plaintiff's, the plaintiff is precluded from claiming to be entitled to the lights in question under the well-known doctrine on which the bill appears to be founded, namely, that a landlord cannot derogate from his own grant.

But a very ingenious argument was addressed to me, namely, that although in truth the defendant's lease was prior in date to the plaintiff's, still the defendant, by erecting these great buildings on the land, which are manifestly a great improvement in value to the property, is committing waste. Now, in my opinion, that is not proved. As I understand the law, the erection of buildings upon land which improve the value of land is not waste. In order to prove waste you must prove an injury to the inheritance. I ¹quite agree that it is not mere injury in the sense of [542

⁽¹⁾ Vol. ii., p. 652.

⁽²⁾ Hob., 284 (ed. 1724).

⁽³⁾ 5 B. & Ad., 507, 517.

⁽⁴⁾ Hetley, 35.

value. You may prove an injury in the sense of destroying identity, by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law, which has not been extended in modern times. In the lease in question, not only is there no covenant restraining the lessee from erecting buildings, but there is a covenant that he will keep all future buildings and erections in repair, showing that the erection of buildings was contemplated. Therefore, so far as the lease goes, it is almost an implied license to erect buildings. But, independently of license, we must consider that if there had been waste at law, the landlord could, before the abolition of the action for waste, have brought an action or obtained an injunction, and that he would be entitled to the latter now if the injury were sufficiently serious. It is plain to my mind, looking at the nature of the works and at what the defendant is doing, that the lessors could neither have done the one formerly, nor could they do the other now. In fact, I am satisfied it is not waste.

With reference to the authorities, the doctrine is so well laid down in *Doe v. Earl of Burlington* (¹), that I do not think I need add anything further to it or to the modern expositions of the law on the subject. Therefore, even if it had been pleaded, I do not think that the plaintiff is entitled to say that, because the defendant has done an act which he could not have done lawfully without the license of the landlord, he is entitled to restrain it by injunction when the landlord has given him license. The argument should be carried a step further, and it should be alleged that the landlord has refused a license, and declined to interfere. But the owner in possession of property erecting a building of this kind does not commit an illegal act towards a stranger because somebody else might or might not have a right to stop it. There is no derivation of title under the same landlord in that sense at all. It does not appear to me that if the landlord had refused license, and there had been an act of waste, there is any compulsion upon the landlord to file a bill for an injunction, the action of waste being abolished, and he not being able now to recover possession of the premises by ejectment. The utmost he could do would be to file a [543] *bill for an injunction to restrain the defendant from continuing the building.

Upon those grounds, therefore, it appears to me plain, so far as the substance of the case is concerned, as regards the light and air, that the bill cannot be maintained.

(¹) 5 B. & Ad., 517.

[His honor then referred to the alleged nuisance arising from the noise occasioned by the defendants' machinery.]

It appeared in evidence, as far as I could gather, that at the time when the bill was filed, but certainly shortly before, the two houses were let to weekly tenants, and they are both still so let and fully occupied. Now, as I understand the doctrine in *Simpson v. Savage* (¹), the landlord in such a case cannot bring an action. The injury is a temporary nuisance, because the saws might be stopped and the steam engine might cease working at any moment. It is only an injury to the occupier, and the landlord cannot bring an action, because before his estate comes into possession the nuisance may have ceased, or the person committing it may choose to make it cease the moment the estate comes into possession.

Another ground of action on the part of the landlord might be that the existence of a nuisance of a temporary character would render it more difficult for him to let to a future tenant or to sell. But that is said not to be a good ground of action, because the theoretical diminution of the value of the property cannot be taken into account, inasmuch as the purchaser or the new occupier would have a right to stop the nuisance, so that he ought not to give less on that account than he otherwise would. It appears to me I am not able to overrule *Simpson v. Savage*, and that the principles upon which it was decided apply as much to weekly tenancies as to any other tenancies.

But then it is said that, if that is so, no relief at all can be obtained, and Mr. Jason Smith said that there was some doctrine of this court by which a weekly tenant could not have an injunction. So far as I am aware, that has never been decided, but I should not find the slightest difficulty myself, if an occupier, being a weekly tenant, and his landlord were to join in a suit to restrain a nuisance, in granting them an injunction.

*I can see no reason why a weekly tenancy may not [544 continue from week to week quite as long as a yearly tenancy from year to year; because it is not a holding for one week, but it is a holding from week to week. I do not accede to the doctrine that a weekly tenant could not have an injunction to stop a nuisance which is injurious to his health and comfort, and prevents his residing in the rooms or house he may occupy. I am not aware of any decision to that effect, and I certainly should not be the first to make one.

(¹) 1 C. B. (N.S.), 347.

1875

Fenwick v. East London Railway Co.

M.R.

[His honor then referred to the evidence in the case, and dismissed the bill, but, with the defendant's consent, without costs.]

Solicitors for the plaintiff: Messrs. *Taylor & Son*.

Solicitors for the defendant: Messrs. *Hargrove, Fowler & Blunt*.

[Law Reports, 20 Equity Cases, 544.]

M.R., July 15, 1875.

FENWICK V. EAST LONDON RAILWAY COMPANY.

[1875 F. 76.]

*Railway Company—Erection of Mortar Mill—Nuisance—Injunction—Railways
Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 16, 32.*

The words "purposes aforesaid," in sect. 32 of the Railways Clauses Consolidation Act, 1845, refer only to the purposes mentioned in that section. The remedy against the company in such cases may be by suit for injunction as well as by action for damages. An act is not "necessary" within the 16th section of the said act, merely because it enables the company to execute their works more economically.

Where a railway company for the construction of their works erected a mortar-mill on part of their land close to the place of business of the plaintiff, who complained of the injury and annoyance occasioned by the noise and vibration:

Held, that the mortar-mill was not necessary for the construction of the line, and an injunction granted accordingly.

THE plaintiffs carried on business as linendrapers in Whitechapel. The defendants were constructing their line of railway at the rear and in the immediate neighborhood of the plaintiffs' premises, and had taken for the purposes of their railway a plot of land adjoining the plaintiffs' shop and premises in the rear of the shop.

545] *In January, 1875, the defendants, who had previously excavated to a considerable depth for the purposes of their railway, erected a steam engine and pump on the part of the land which was unexcavated. These were afterwards shifted nearer to the plaintiffs' shop, causing considerable vibration, and on the 8th of June they began to construct a mill for grinding mortar within 10 ft. 6 in. from the east wall of the plaintiffs' shop, and soon after commenced working it.

The bill alleged that the vibration and noise occasioned by the mortar-mill were such as to destroy the comfort of the plaintiffs, and of the occupiers of the premises, and of the customers; that their manager and his wife, who resided in the house, were unable to sleep when the mortar-mill was going, and that the plaintiffs' business would be

most seriously injured unless the mill was removed or the working thereof stopped.

The bill prayed that the defendants, their contractors, servants, workmen, and agents might be restrained from working the mortar-mill, steam engine, and pump, so as to be a nuisance or injury to the plaintiffs; and, secondly, that the defendants might be ordered to pay to the plaintiffs, in addition to or in substitution for the relief before prayed, such damages as the court might think fit to award.

The plaintiffs now moved for an injunction in the terms of the prayer of the bill, and affidavits were filed on their behalf which the defendants had not an opportunity of answering. The nuisance complained of mainly related to the mortar-mill.

Mr. *Chitty*, Q.C., and Mr. *L. Field*, for the plaintiffs, in support of the motion, referred to *Hammersmith and City Railway Company v. Brand* (¹).

Mr. *Fooks*, Q.C., and Mr. *C. Browne*, for the defendants: This is not a case in which the railway company can be restrained by injunction. By sect. 32 of the Railways Clauses Act, 1845, railway companies are empowered to take and occupy land so long as may be necessary for the construction of the railway or of the accommodation works, and to use the same for the various *purposes therein mentioned, [546 and it provides that in exercise of the powers thereby given it shall be lawful for the company to deposit and also to manufacture and work up upon such lands materials of every kind used for constructing the railway, . . . and "for the purposes aforesaid" to erect thereon workshops, sheds, and other buildings of a temporary nature.

Under this section, coupled with the 16th section, I submit that the company is entitled to erect and to work their mortar-mill, which is a building of a temporary nature necessary for the railway works. The words "for the purposes aforesaid" cannot be limited to the specific purposes mentioned in the 32d section, but must be taken to include other purposes previously mentioned in the act.

Besides, in the 32d section, the company is protected, so far as the present proceeding is concerned, by the words "provided always that nothing in this act contained shall exempt the company from an action for nuisance or other injury,"—for those words limit the remedy of the aggrieved party to an action at law, and an action for a nuisance could

(¹) Law Rep., 4 H. L., 171.

not, at the time when this act was passed, have an injunction combined with it.

Turning to the 16th section, we find words which completely cover the present case, for the railway company is thereby empowered to "erect such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they think proper." Now, taking the words "for the purposes aforesaid" in the 32d section as including these powers conferred by the 16th, the defendants are clearly authorized by the Legislature to erect the mortar-mill complained of. They are also empowered to do all other acts necessary for making, maintaining, altering, or repairing, and using the railway. The making of mortar for which this mill is worked is deemed by the company necessary for the works of the railway.

The nuisance, if any, in this case is only temporary; there is no structural injury to the plaintiffs' house; there is nothing of the nature of the damage contemplated in sect. 68 of the Lands Clauses Act, so as to entitle the plaintiffs to compensation.

Mr. *Chitty* in reply.

547] *SIR G. JESSEL, M.R.: The point I am going to decide is merely one of law. I have only had the affidavits read for the purpose of seeing if it was a case not for an *ex parte* injunction, but for an interim order, where the other side is served with notice and has not had an opportunity of answering the affidavits. I am clearly of opinion on the facts that, supposing the plaintiffs are right as to the law, it is a case for that kind of injunction which is not strictly an *ex parte* injunction but which is very much like it. They give notice to the other side, they have not had time to answer, and therefore I shall give them an injunction, subject to what I am going to say, on the usual terms of an undertaking in damages, to restrain the working of this mortar-mill until the next motion day.

Mr. Fooks raises a point of law which is an extremely important one, and which, if I had been less familiar with the railway law than I am, I should have taken more time to consider, and heard more argument upon; but having entertained for very many years past certain views as to the construction of these sections, which I have acted upon in practice, I do not think it necessary either to hear further argument or to take time to consider.

The first point raised was that under the 32d section of the Railways Clauses Act, the defendants, the railway com-

pany, having erected this mortar-mill (I may confine my attention to that) for the purpose of making mortar to be used in the construction of their railway, were entitled to continue the working of that mortar-mill, notwithstanding any injury that might thereby be inflicted on the plaintiffs.

As I read the 32d section, that is not the true construction of it. The section empowers the company to take lands for what are generally called temporary purposes, and to use the same for the following purposes: "for the purpose of taking earth or soil by side-cuttings therefrom; for the purpose of depositing spoil thereon; for the purpose of obtaining materials therefrom for the construction or repair of the railway, or such accommodation works as aforesaid, or for the purpose of forming roads thereon." Not one of the purposes there mentioned is making mortar; consequently that is not within the purposes or in the exercise of the powers aforesaid. The section then provides that it shall be *lawful for the company to do various things upon [548 such lands, such as depositing and manufacturing materials used in constructing the railway, and digging clay, stone, gravel, or sand, "and for the purposes aforesaid to erect thereon workshops, sheds, and other buildings of a temporary nature; provided always, that nothing in this act contained shall exempt the company from an action for nuisance or other injury."

Mr. Fooks argued that "the purposes aforesaid" did not mean the purposes specifically mentioned in that section, but any other purposes mentioned in the act, including the powers given by the 16th section.

First of all, I do not agree with him as regards grammar, because there are all sorts of intervening powers as to which it is quite plain there are other limitations, and I think that these words refer to the purposes mentioned in the section, and not to those in preceding sections at all. As regards the 16th section there is an express limitation of those powers of a totally different character, as I shall have occasion to show presently. Therefore I am of opinion that "the purposes aforesaid" mean the purposes mentioned in the 32d section, and no other.

That, of course, would decide the question, but I think there is another observation to be made. The limitation is that "nothing in this act contained shall exempt the company from an action for nuisance;" and Mr. Fooks argued that even as regards the powers to which the section related, the limitation showed that, though you might bring an action for nuisance, you could not have any other remedy. I decline

to take so limited a view. "Action for nuisance" means the legal remedy for nuisance. In my opinion the word "action" there used, is not used in the limited sense of an action in a court of common law, but it is used in the sense of any action a person may take, either to prevent the nuisance or to get damages for the nuisance, such as an action for damages.

Then there is another point which is exceedingly technical, but which I think is equally untenable. In an action for nuisance when this act was passed the plaintiff could not claim a writ of injunction, but can now; and it would be very absurd to say that if an injunction could now be obtained in a court of common law because the company is 549] not protected against an action for *nuisance, yet that the Legislature has prohibited this court, which is the original one for issuing injunctions, from giving the same remedy. It would be a most startling conclusion. I am of opinion, therefore, that if Mr. Fooks was right as to the construction of the first part of the 32d section, which I think he is not, he could not succeed under the proviso in the second part of the section.

Now, I must go back to the 16th section, under which, if at all, the company can do what is complained of. The 16th section is in terms a very wide section, and was intended to be wide. It allows the company, among other things, to "erect and construct such houses, machinery, apparatus, and other works and conveniences as they think proper." There is no limit as to their erection. But there is a limit to the user; "they may do all other acts necessary for making, maintaining, altering, or repairing and using the railway"—that is the user—"provided always that in the exercise of the powers by this or the special act granted, the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special act, and any acts incorporated therewith, provided, to all parties interested for all damage by them sustained by reason of the exercise of such powers."

There is, therefore, a double limitation. They can only use the buildings and works referred to for purposes necessary, and they must do "as little damage as can be."

The first question is, what do the words "do as little damage as can be" mean? It is settled that "to do as little damage as can be" does not mean make the works without any damage, but refers to the mode of constructing and using those works. Upon that point there is the authority

of *Reg. v. East and West India Docks Company* (¹), where Lord Campbell says: "I ought to have said that I do not think the prosecutors can avail themselves of the proviso in the 8th & 9th Vict. c. 20, s. 16, that in exercise of their powers 'the company shall do as little damage as can be, and shall make full satisfaction.' I think that section does not apply to what is to be done in the execution of their powers, but to the manner of doing it." So that the defendants could not succeed on the ground that they might erect their mortar-mill in some other part of the field or place, and thereby it would cause more damage.

*Then the question is, whether the limitation as to [550 its being necessary applies, and I am of opinion that it does. It is not pretended that they cannot buy mortar, or get mortar elsewhere, or make it elsewhere. On that point there is authority also: *Reg. v. Wycombe Railway Company* (²). The question there was as to the diversion of roads under the same section, and Lord Chief Justice Cockburn says this (³): "Then comes the question whether the diversion of this road was necessary for the construction of the railway. Mr. Keane contended at first that it was necessary for the construction of the railway, because it was incumbent upon the company to construct the railway according to the plan, and this diversion had been marked upon the plan." It was a very strong case in that way, because they had actually marked it on the plan before they went to Parliament. "He did not with much force press this argument, and he ultimately gave it up. I am of opinion that it was entitled to no weight. The question is, was the diversion necessary for the formation and construction of the railway? Necessary it was, perhaps, in one sense, looking at the convenience of the company economically, but by no means necessary in any other point of view." This was exactly the case of the mortar; the company may buy mortar anywhere, but it may be cheaper and more convenient to them to make the mortar at this place. It is a much stronger case than the diversion of the road. "But we are not to look at the convenience of the company alone, but to the accommodation and convenience of those who have rights of property which are interfered with, of those who have immediate access to the road or who use it of necessity in the ordinary course of their business. It was not necessary for the construction of the railway that the road should have been permanently diverted; it might have been carried

(¹) 2 E. & B., 471.

(²) Law Rep., 2 Q. B., 310.

(³) Law Rep., 2 Q. B., 320.

over the railway or under it; it was merely less expensive to the company to divert the road as they have done than to carry it over or under as they ought to have done, and as required by the act of Parliament. I think that this return is bad. It alleges that it was necessary for the purpose of constructing the railway, that the road should be diverted, and that by virtue of the powers of their act, and the acts incorporated therewith, they did permanently divert the road. The question whether that is true or not, turns entirely upon the *construction to be put upon the term 'necessary,' in sect. 16. I think the meaning we ought to give to the word is, that it is only necessary for the construction of the railway to permanently divert the road, when the railway cannot be made without so diverting it."

The other judges agreed. Mr. Justice Lush makes this observation ('): "Obviously the sanction of Parliament to the diversion of public streets, roads, and ways is conditional upon its being necessary for the purpose of constructing the railway, and it never was intended to give to railway companies power arbitrarily to divert rivers, roads, streets, or ways, merely for the purpose of saving them the expense of building bridges over the railway. I read the words 'for the purpose of the construction of the railway' as importing this: when the railway is to interfere with a public road or street or river, so that the two cannot be used together, one must give way to the other, and then they have power to make such 'diversions or alterations in the roads, streets, or rivers as may be necessary in order the more conveniently to carry the same over or under or by the side of the railway as they may think proper.' Having power to divert or alter, they have the choice of doing it either by carrying it over or under or by the side of the railway; but that is only conditional on its being necessary to do it for the purpose of constructing the railway. There is not a word in the section intimating that they have this power merely in order that they may construct the railway more economically, or save expense to the company."

On the principle here laid down I have to be satisfied that the railway cannot be constructed without the mortar being made at this particular place.

I think the case is concluded by the authorities (I should have thought it would have been by good sense without authority), that you cannot damage your neighbor's property merely for the purpose of saving yourself a little money, where it is unnecessary for the construction of the railway;

(') Law Rep., 2 Q.B., 325.

and there is a stronger reason in this case than in the one last referred to for holding this to be the true construction, because Mr. Fooks has pressed on me that the compensation sections do not apply. It is a case, he says, where there is no structural damage, and you could not come under *the 68th section, and therefore, if he were right, they [552 might do this injury to the plaintiffs without giving them any compensation at all. That is an additional reason for holding them strictly to the terms of the act of Parliament, that they must show that it is necessary, in order to construct their railway, that they should inflict this damage on the plaintiffs. It is quite clear that it is not, and I have no hesitation, so far as the law is concerned, in making the order, subject to the undertaking as to damages.

Solicitors for the plaintiffs: Messrs. *Field, Roscoe & Co.*

Solicitors for the defendants: Messrs. *Wilson, Bristows & Carpmael.*

[Law Reports, 20 Equity Cases, 556.]

M.R., July 23, 1875.

*WEBB V. EARLE.

[556

[1875 W. 156.]

Company—Preferential Dividend—Payment of Arrears out of subsequent Profits.

The directors of a limited company, under the authority of the articles of association, and with the sanction of a general meeting, issued preference capital carrying a dividend at £10 per cent. per annum, payable half-yearly:

Held, on demurrer, that, if the profits of any year were insufficient to pay the dividend in full to the preference shareholders, the deficiency might be made good out of subsequent profits.

DEMURRER. The West India and Panama Telegraph Company, Limited, was registered under the Companies Act, 1862, on the 30th of July, 1870, with a capital of £650,000, divided into 65,000 shares of £10 each.

The 39th, 41st, and 95th articles of association provided as follows:

39. "The directors may, with the sanction of a special resolution of the company previously given in a general meeting, increase the capital of the company by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, with such rights and privileges, or with such restrictions and on such terms and conditions as the company in general meeting directs, or, if no direction is given, as the directors think expedient."

41. "Any capital raised by the creation of new shares

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Webb v. Earle.

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shall, unless otherwise directed by the resolution of the general meeting, be considered as part of the original capital, such new shares shall in every respect be subject to the same provisions with reference to the payment of calls, transfer, and forfeiture of shares on non-payment of calls or otherwise as if they had been part of the original capital."

95. "The directors may, with the sanction of the company 557] at *the ordinary general meeting, declare a dividend to be paid to the members in proportion to their shares, and may also at their discretion declare an *interim* dividend at any rate not exceeding £10 per cent. per annum."

On the 17th of March, 1873, at an extraordinary general meeting held pursuant to notice, it was resolved: "That the capital of the company be increased by the issue of 25,000 new shares of £10 each, such shares being preference shares, with such amount of preferential dividend, and with or without a power of redemption on terms to be arranged, and with or without the option within a specified time of turning the preference shares into ordinary stock, and with or without such other rights and privileges, and with such restrictions, and to be issued at such price and on such terms and conditions as the directors of the said company may deem expedient, such shares to be offered to the members of the company in proportion to the number of existing shares held by them in pursuance of article 40 of the articles of association."

The resolution having been duly confirmed, a letter, dated the 2d of May, 1873, was addressed by the secretary to all the shareholders, inclosing a copy of the said resolution, stating the position of the company and containing the following paragraph:

"The preference capital authorized is £250,000, carrying dividend at £10 per cent. per annum, payable half-yearly, and entitled to a *pro rata* participation in surplus dividends after £10 per cent. has been paid on the ordinary share capital of £650,000."

The new preference shares were offered to the existing shareholders, and were all allotted. A copy of the resolution, and of the terms of issue, as above stated, were indorsed on the share certificates.

On the 15th of June, 1874, at an extraordinary general meeting, it was resolved to increase the capital of the company by the issue of 10,000 new ordinary shares of £10 each, and 10,000 new second preference shares of £10 each, with cumulative preferential dividend at the rate of £10 per cent. per annum, to rank after the existing preference shares of £250,000.

Of the second preference shares £34,580 were allotted and subscribed for.

*The bill was filed by the plaintiff, the owner of [558 fifty ordinary shares in the company, on behalf of himself and all other the ordinary shareholders in the company, except such of the defendants as were ordinary shareholders, against certain of the first preference shareholders and one of the second preference shareholders (as representing the other preference shareholders of both classes) and the company, and after certain allegations (which, so far as material, have been hereinbefore stated) it alleged as follows:

That the revenue account furnished for the year ending the 30th of September, 1873, showed a balance only of £5,690, which it was considered necessary to apply to the reserve fund, and was so applied; but the accountants of the company, with the privity and consent of the directors and the defendants, the preference shareholders, placed "to the credit of the preference shareholders in suspense" the amount of the dividend on the calls paid by them to the 30th of September, 1873:

That in the balance sheet of the directors up to the 31st of December, 1874, there was a balance in favor of the company of £2,925, which was carried to the general reserve account, but that the directors, although there were no profits available for division, had in their account credited "the preference shareholders in suspense" with the sum of £36,682 first preference unpaid dividends, being a dividend which they alleged to be applicable to the shares of the first of the said issues of preference shares, and the sum of £445, which they alleged to be applicable to the dividends on the second issue of preference shares:

The bill prayed that it might be declared that the plaintiff, representing the ordinary shareholders of the company, was entitled in every year to receive a dividend on his shares after the preference shareholders under the first of the issues hereinbefore mentioned had been paid £10 per cent. for the year in question, and the preference shareholders under the second issue had received £10 per cent. for the current and previous years; and that the preference shareholders under the first issue were not entitled to make up the deficiency or failure of any previous year out of the dividends of the current years.

The defendants demurred to the plaintiff's bill for want of equity.

*Mr. Davey, Q.C., and Mr. Romer, for the defen- [559
15 ENG. REP. 62

dants, in support of the demurrer: This bill cannot be sustained. The articles of association referred to in the bill fully authorized the resolution of the general meeting, and, there being nothing to limit the preferential dividend to the profits of the current year, the directors were acting within their powers in carrying a portion of the profits of a subsequent year to the account of the dividend of the preference shareholders for the year when the profits were insufficient to make up the guaranteed £10 per cent.

The case is governed by *Henry v. Great Northern Railway Company*⁽¹⁾. In that case preference shares in the company had been issued under parliamentary authority, and the resolution for issuing them provided that they should bear a preferential dividend at a fixed rate, and it was held that if the profits at any period of distribution were insufficient to pay in full the dividends due to the preference shareholders, the arrears must be paid out of subsequent profits. The same principle was followed in *Corry v. Londonderry and Enniskillen Railway Company*⁽²⁾; *Sturge v. Eastern Union Railway Company*⁽³⁾; *Crawford v. North Eastern Railway Company*⁽⁴⁾; *Coates v. Nottingham Waterworks Company*⁽⁵⁾.

Mr. Hastings, Q.C., and Mr. E. Cutler, for the plaintiff, in support of the bill: The resolution of the general meeting under which the preference shares were created must be controlled by reference to the articles. By article 41, the dividend on the preference shares was not to exceed £10 per cent. per annum. This cannot be taken as giving the preference shareholders a right to have their back dividends made good out of subsequent profits to the detriment of the ordinary shareholders.

[They referred to *In re London India Rubber Company*⁽⁶⁾.]

SIR G. JESSEL, M.R.: I am of opinion that the defendants are right. The words are *very simple. The resolution authorized the capital of the company to be "increased by the issue of 25,000 new shares of £10 each, such shares being preference shares, with such amount of preferential dividend, and with or without a power of redemption on terms to be arranged, and with or without the option within a specified time of turning the preference shares into ordinary stock, and with or without such other rights and privileges, or with such restrictions, and to be issued at such

(1) 1 De G. & J., 606.

(2) 29 Beav., 263.

(3) 7 D. M. & G., 158.

(4) 3 K. & J., 723.

(5) 30 Beav., 86.

(6) Law Rep., 5 Eq., 519.

price and on such terms and conditions as the directors of the said company may deem expedient." Consequently these shares must be part of the capital entitled to preferential dividend, whatever that may mean.

Then the directors exercise the power by a contract by letter. The preferential capital authorized is £250,000, carrying dividend at £10 per cent. per annum, payable half-yearly, and entitled to a *pro rata* participation in surplus dividends after £10 per cent. has been paid on the ordinary share capital of £650,000.

Now it has been said in *Henry v. Great Northern Railway Company* (1), that there is no magic in the word "dividend"; it may be interest, or it may be an aliquot proportion of dividend, or it may be the dividend itself, that is, the fund to be divided,—what it means can only be decided by looking at the words used in the case in question. Here the shareholders are told that the new capital carries dividend at the rate of £10 per cent. per annum, payable half-yearly. What, then, does "dividend" here mean?

When you look at the resolution, articles, and letter together, it clearly means this, that the dividend on the preference shares is to be paid out of the dividend declared, if there is one,—in other words, that the right is restricted to this, that it is to be paid out of what is declared so far as it will go, and that the preference shareholders cannot get any more, and that they cannot get it when there is no dividend declared. They are to have it if there is anything to pay; if there is nothing to pay they are to go without until there is something to pay; but it does not mean that if there is not enough to pay one half year they are not to have it the next half year, or the third or fourth or fifth half year.

The case is exactly the same as that put by Lord Justice Knight Bruce in *Henry v. Great Northern Railway Company* (1), from which this case, in my opinion, is not [561] fairly distinguishable. He says this: "A., B. and C. are partners in a trade, each having contributed an equal share of capital, but they agree that out of the profits £5 per cent. per annum shall preferably, and in the first instance, be paid to A. on his portion of the capital. The division of the profits among them is agreed to be and is periodically made. At one of the periodical divisions the profits fall short of a sufficiency to pay this amount to A., from the time to which out of the profits his interest had previously been paid. Is the deficiency not afterwards to be made

(1) 1 De G. & J., 606.

(2) 1 De G. & J., 643.

good to him from profits more than adequate to answer it? I have heard no reason why not."

It really comes to nothing more than that. The preference shareholders are to have a dividend of £10 per cent. per annum, but it is to be paid as on preference capital, that is, so far as the profits shall extend; there is nothing to prevent them going to the profits of a subsequent period when they are sufficient to make it up. I therefore allow the demurrer.

Solicitors for the plaintiff: Messrs. *Farrer, French & Tatham*.

Solicitors for the defendants: Messrs. *Bircham & Co*.

[Law Reports, 20 Equity Cases, 561.]

M.R., July 31, 1875.

In re CULL'S TRUSTS.

Trustees Relief Act—Payment into Court—Costs.

The trustees of a trust fund to which their *cestui que trust* has become entitled in default of appointment by a tenant for life, are justified in paying it over to him on being informed in writing by the solicitor to the parties that he has reason to believe that no appointment has been made; and would be free from liability in doing so.

Trustees who under such circumstances pay the trust fund into court under the Trustees Relief Act will not, as a rule, be entitled to their costs.

In re Wyll's Trusts (1) explained.

THIS was a petition by Richard Cull, for the payment to him of a trust fund which had been paid into court under the Trustees Relief Act.

562] *By a settlement made on the petitioner's marriage, certain trust property was settled in trust for the petitioner's intended wife for her life, for her separate use, and, if she should die in his lifetime, then in trust for such person and for such purposes as she should by her will or by deed appoint; and in default of such appointment in trust for the petitioner absolutely.

Mrs. Cull died on the 1st of December, 1874, and without having, so far as appeared, exercised her power of appointment by deed. At the time of her death the property subject to the trusts of the settlement consisted of the sum of £1,010 3s. 10d. Consols, the dividends on which had been paid to her or to the petitioner by her direction.

The petitioner, after his wife's death, applied to the then trustees, the executors of the last surviving trustee of the

(1) 28 Beav., 458.

settlement, for a transfer of the stock; they did not, however, comply with his request on the ground of the possibility of Mrs. Cull having exercised her power of appointment, whereupon the solicitors who acted for Mr. and Mrs. Cull wrote to the solicitor of the trustees as follows:

"Mrs. Cull, to the best of our knowledge, since her marriage never employed any solicitors but ourselves, and we believe there is not the slightest ground for supposing that any appointment ever took place, nor had the trustees notice of any. The settlement has always remained in our office. We are quite willing to satisfy you as to any explanation you may require, and to give a statutory declaration to that effect, and one by Mr. Cull also. We object to the trust fund being paid into court."

The solicitor of the trustees took the opinion of an eminent conveyancer on the question referred to, and he advised that, though funds were constantly paid by trustees to *cestuis que trust* under similar circumstances, yet, if the trustees desired to do so, they would be justified in paying the money into court, and would be allowed their costs: *Re Wylly's Trusts* (1); and the more so that they were not strictly trustees, but executors of a surviving trustee. He then stated the evidence which the trustees should require if they did not pay the money into court.

*The trustees thereupon transferred the trust fund [563 into court, and this petition was now presented praying for its transfer to the petitioner, and that the trustees might be ordered to pay the costs of the transfer into court, and of the present application.

Mr. Chitty, Q.C., and Mr. Millar, for the petitioner.

Mr. Ince, Q.C., for the trustees: Where trustees entertain *bona fide* doubts as to the persons entitled to a trust fund, they are justified in paying it into court: *In re Lane's Trust* (2). In this case they were advised by an eminent counsel that they might properly pay the money into court, on the authority of *Re Wylly's Trusts* (1), and, even if they have acted with extreme caution, it is not a case in which they should be made liable for the costs.

SIR G. JESSEL, M.R.: If there had been no such case as *Re Wylly's Trusts*, and no such opinion as that referred to, I should probably have made the trustees pay the costs of the transfer of the fund into court. They had no notice of any appointment by the lady, and no ground for believing that any appointment had ever been made. The solicitors

(1) 28 Beav., 458.

(2) 24 L. T. (O.S.), 181.

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who had acted for Mrs. Cull from the time of her marriage wrote to say that there was not the slightest ground for supposing that she had made any appointment. The trustees had, therefore, fully discharged their duty, and I am of opinion that they could not have been made liable if they had then paid over the fund to the petitioner, even if an appointment had been subsequently discovered.

In the case of *Re Wyllly's Trusts* the late Master of the Rolls said: "The trustees had a right to satisfactory evidence that Mrs. Wyllly had made no appointment of the fund," by which, I understand him to mean such evidence as a conveyancer would require. A letter from the solicitor in such a case would be quite sufficient; some practitioners require a statutory declaration, but it is superfluous. I do 564] not understand that the Master of the Rolls *intended more, otherwise in every case trustees would have to pay the money into court, and Lord Romilly's judgment does not warrant any such conclusion.

But though I think it is quite clear, yet as the point does not appear free from doubt or ambiguity to other minds, I do not think that I shall make these trustees, who have acted with such over-caution, in this, the first case of the kind that has come before me, pay the costs of the transfer into court; but I wish it to be understood that the next set of trustees who come before me having so acted must pay the costs. There will be no costs of the present application.

Solicitors for the petitioner: Messrs. *Smith, Stenning & Croft*.

Solicitor for the trustees: Mr. *Wynne E. Baxter*.

[Law Reports, 20 Equity Cases, 564.]

M.R., July 3, 1875.

BERESFORD V. BROWNING (')

[1861 B. 303.]

BROWNING V. BERESFORD.

[1861 B. 302.]

Partnership—Agreement as to Payment by Surviving Partner of Deceased Partner's Share—Joint and Several Liability.

By an agreement between A., B., C. and D., four partners in a mercantile business, after reciting, amongst other things, that all the partners had considerable sums of money employed in the business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said

(') Affirmed, *post*, p. 637.

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business immediately after the retirement or decease of either of them, it was agreed between and by A., B., C. and D., that in case of either of them retiring from the copartnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner should not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said copartnership business immediately, but the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), should be repaid out of the business by the continuing or surviving partners by instalments, as therein mentioned, until the whole amount should be fully paid or discharged, unless the surviving or *continuing partners should [565] wish to pay such share or balance at an earlier period, which they were to be at liberty to do :

Held, that the agreement was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and was not intended to alter the nature of the liability :

Held, further, that if the agreement did create a new liability, such new liability arising out of a contract by a mercantile partnership was in equity several, and not joint merely.

On the 20th of February, 1855, an agreement was entered into between James Browning, William Browning, Henry Browning, and Francis Browning, which was as follows :

"Whereas the said parties hereto, together with William Hardwick Browning, now deceased, did previous to his death, and the said parties hereto have since that event continued to carry on business together as oil merchants in copartnership, and an agreement dated the 10th day of November, 1852, was entered into between and signed by them, and which agreement defined the proportions of their respective interest in the said business ; and whereas it is now understood and agreed between and by the said parties hereto that from and after the first day of January, 1853, the profits of the said business, after deducting all outgoings, rents, and other expenses, should be divided between them in the portions after stated, and that this agreement shall be considered as the basis of the partnership in continuation of the before-mentioned agreement : Now, therefore, in consideration of the premises and of the said copartnership, and of the mutual engagements between them, before and hereinafter mentioned, it is hereby agreed by and between them the said James Browning, William Browning, Henry Browning, and Francis Browning, that they shall henceforward continue in copartnership in the said business of oil merchants in, by, and under the name, style, and firm of James, William & Henry Browning & Co. And also that after payment of the rents hereinafter agreed on and specified, and interest of capital belonging to each other employed in the said business, and all other outgoings and expenses of the said business, the clear profits of the said business shall be divided between them from time to time in the proportions

following: four twelfth parts thereof to the said James 566] Browning, three twelfth parts *thereof to the said William Browning, three twelfth parts thereof to the said Henry Browning, and two twelfth parts thereof to the said Francis Browning. And also that they shall continue to carry on the said business at the above-mentioned house, No. 113 St. John Street, and the yard and warehouses at the back thereof, formerly the Windmill Inn Yard. And also that the business shall pay the rent as heretofore, and all taxes, rates, assessments, and charges whatsoever, whether parliamentary, parochial, or otherwise, which during the continuance of the said copartnership shall be taxed, rated, charged, assessed, or imposed on the said premises or any part thereof. And also clerks and servants' wages, coals, and lights, as heretofore paid out of and borne by the said copartnership business before the said division of profits. And whereas the said J. Browning and all other the said parties have considerable sums of money employed in the said business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business immediately after the retirement or decease of either of them, now, therefore, it is further agreed between and by the said J. Browning and W. Browning, H. Browning and F. Browning, that in case of either of them retiring from the copartnership business, or departing this life during the continuance thereof, then and in such case the continuing or retiring partners or partner shall not be compellable by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said copartnership business immediately, but the clear balance as ascertained from the last stock-taking due to such retiring or deceased partner, together with any additional capital (if any), shall be repaid out of the business by the continuing or surviving partners in manner following (that is to say): the sum of £2,000 and interest at £5 per cent. per annum on the whole sum which shall be found due shall be paid at the end of one year from such retirement or decease as aforesaid, and the like sum of £2,000 shall be paid at the end of each next succeeding year with interest at £5 per cent. as aforesaid on the balance of the capital, until the whole amount shall be fully paid and discharged, unless the surviving or continuing partners should wish to pay such share 567] or balance at an earlier period, which they *are to be at liberty to do. Lastly, it is understood and agreed that upon the death of either of the said parties during this co-

partnership, the last stock-taking of the said firm shall be conclusive as to the share or amount of interest of the deceased partner in the said business, and shall be the sum to be paid to his executors, in the proportions and at the times before-mentioned, as in the case of retirement of any partner, with interest thereon from the date of such stock-taking at the rate of £5 per cent. per annum in lieu of profits from that time, and without any deduction in respect of bad debts (if any) to accrue between the time of such stock-taking and the day of the decease of such partners so dying as aforesaid: provided always, and it is hereby expressly agreed and declared, that in case at the time of the death of either of the said parties to these presents, the stock shall not have been taken in the usual manner at the end of the month of June or during the following July, or the same having been taken shall not have been duly made up and signed by the said parties hereto, or a majority of them, on or before the 31st day of December following, or afterwards by all of them, that then, in the event of decease of either of the said partners between the 31st day of December and the 30th day of June following, the stock shall be taken afresh, and the executors or administrators of the deceased partner shall be entitled to his share of the profits of the said business from the then last proper stock-taking, such share to be duly ascertained and the amount of the share of the deceased partner shall be paid to the executors of the deceased partner at the times and in the proportions before mentioned; but in case in the event of the decease of either of the said partners between the 30th of June and the 31st day of December in any year, the stock having been previously duly taken at the usual time, but not carried out into the books and signed, the surviving partners shall be allowed thirty days from the day of the deceased partner's death to complete the stock-taking, and the executors of the deceased partner shall be bound thereby, and in default of the surviving partners so completing such stock-taking so taken, but not carried out as aforesaid within the said space of thirty days, then the stock shall be taken entirely *de novo* as from the last proper stock-taking duly entered in the books as before provided for, and the executors of *the de- [568 ceased partner entitled to his share of the profits to his death, and to be paid as before provided for.”

James Browning died on the 22d of April, 1861, intestate. These suits were instituted for the purpose of administering his estate and taking the partnership accounts. A decree was made in both suits, and under an inquiry thereby

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directed it was ascertained that the sum of £64,784 15s. 7d. was due from William Browning, Henry Browning, and Francis Browning, in respect of James Browning's capital in the said business, and this sum was payable with interest at £5 per cent. by instalments of £2,000, payable on the 22d of April in each year. By the order made on further consideration, it was ordered that William Browning, Henry Browning, and Francis Browning, or the survivors of them, should pay the said instalments to the legal personal representative of the intestate within one calendar month after the 22d of April in each year.

Henry Browning died on the 3d of November, 1871, and William Browning on the 9th of March, 1872.

The instalments were regularly paid down to and inclusive of the instalment which became due on the 22d of April, 1874. On 3d of May, 1875, Francis Browning, being unable to pay his debts, instituted proceedings in the Bankruptcy Court for liquidation of his affairs by arrangement.

Under these circumstances the present petition was presented by the legal personal representative of the intestate, for the purpose of raising the question whether recourse could be had to the estates of Henry Browning and William Browning for payment of the instalments due and to become due; and it was arranged that this question should be argued and decided on the present petition without the institution of any supplemental suit.

Mr. *Chitty*, Q.C., and Mr. *Ingle Joyce*, for the petition: This is an agreement between the partner who first dies and the three partners surviving at the time as to the mode of payment of a debt due from the three surviving partners. The debt is a partnership debt, and is therefore *prima facie* a several debt in equity, and there is nothing in the agreement to convert it into a joint debt. The burden of showing [569] that it is a joint debt lies on those *who say it is such. Even at law such an agreement would be construed as several: *Sorsbie v. Park* (*).

Mr. *Marten*, Q.C., and Mr. *Grosvenor Woods*, for parties in the same interest.

Mr. *Horton Smith*, for Francis Browning, referred to the cases cited in *De Gex* and *Horton Smith on Creditors' Deeds* (*), and *Lindley on Partnership* (*).

Mr. *Waller*, Q.C., and Mr. *Bunting*, for the representatives of Henry Browning: First, there is no personal liability to pay; the only agreement is that the share of the deceased shall be "repaid out of the business."

(*) 12 M. & W., 146.

(*) Page, 107.

(*) 3d ed., p. 384.

[The MASTER OF THE ROLLS : Does that make any difference ? The three have received assets more than enough to pay the debt. Must they not pay ?]

Next, we say that the liability was joint, not several. No doubt the ordinary liability of a partner in a trading firm to an outside creditor is in equity several as well as joint : *Liverpool Borough Bank v. Walker* ⁽¹⁾ ; but this is not the case of an outside creditor. The agreement is made for the purpose of regulating the rights of the partners *inter se* ; and these rights must be governed exclusively by that agreement, which only creates a joint liability on the surviving partners. "In equity, if several persons contract a debt, they are not only jointly, but also severally, liable to repay it, unless their obligation is created by some instrument which in terms imposes upon them a joint obligation only." *Lindley on Partnership* ⁽²⁾.

[The MASTER OF THE ROLLS : If that is meant to apply to persons who are not partners, I should hesitate to accept it. His honor referred to *Thorpe v. Jackson* ⁽³⁾ ; *Jones v. Beach* ⁽⁴⁾ ; *Other v. Iveson* ⁽⁵⁾.]

*In the same work it is said ⁽⁶⁾, "It must not be supposed that in equity every liability contracted by partners is several as well as joint. It is a question of intention on the part of the firm and on the part of those with whom it deals. If, therefore, partners enter into a contract binding themselves jointly and not severally, and if such contract is not a mere security for the payment of a pre-existing debt, or for the performance of a pre-existing joint and several obligation, and if it has not been made joint in form by mistake, the effect of the contract will be in equity, as in law, to impose a joint obligation, and no other."

[The MASTER OF THE ROLLS : That does not help you, because here there was a pre-existing obligation. Besides, there are cases in which a partnership may incur a several liability under an instrument joint in form, although there is no pre-existing obligation : as, for example, by giving a joint promissory note.]

The case is governed by *Sumner v. Powell* ⁽⁷⁾ ; *Wilmer v. Currey* ⁽⁸⁾ ; *Clarke v. Bickers* ⁽⁹⁾.

Mr. *Hastings*, Q.C., and Mr. *Abraham*, for other respondents.

Mr. *Chitty*, in reply, cited *Buckley v. Barber* ⁽¹⁰⁾ ; *De-*

⁽¹⁾ 4 De G. & J., 24.

⁽²⁾ 8d ed., p. 882.

⁽³⁾ 2 Y. & C. (Ex.), 553.

⁽⁴⁾ 2 D. M. & G., 886.

⁽⁵⁾ 3 Drew., 177.

⁽⁶⁾ Page 384.

⁽⁷⁾ 2 Mer., 80 ; T. & R., 423

⁽⁸⁾ 2 De G. & Sm., 347.

⁽⁹⁾ 14 Sim., 639.

⁽¹⁰⁾ 6 Ex., 182.

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waynes v. Noble (¹); and submitted that the agreement did not vary the pre-existing liability, but only the mode of satisfying it.

SIR G. JESSEL, M.R.: The question in this case has taken a very great deal of time in discussion, but the point is really a very simple one. Four persons were in business as oil merchants. They came to an agreement to regulate the mode of paying out the share of any one who should die or retire. That agreement is dated the 20th of February, 1855, and is as follows: [His honor read the material part.] It is noticeable that the agreement speaks of the share in the copartnership business, which is, of course, a share of the capital. It is to be repaid out of the business "by the continuing or surviving partners in manner following;" and [571] then the instalments are mentioned of £2,000 a year. Then there is an agreement that upon the death of any one the last stock-taking shall be conclusive as to his share of capital, and he shall get interest at £5 per cent. Then there is a proviso that if there shall be no stock-taking, it shall be taken after the death in the way there mentioned for ascertaining the share.

The first thing to consider is, what was the position of the parties when this agreement was entered into, and what would be their position when one died. Of course, it was wholly uncertain which would die first, or which would retire first. The allegation is that it would be impracticable or highly detrimental for the others to repay or advance from the business the sum in question immediately. Therefore the object of the parties was to avoid detriment to the others. It has been agreed on all hands, and I think rightly, that when you come to look at the form of this agreement, it was not merely an agreement for providing for the payment of the share of the capital belonging to the deceased or retiring partner, but was also impliedly an agreement that the remaining partners, whether continuing or surviving, should carry on the business. On the clause, as I read it, it did not impose any definite term, although even that is open to argument. That being so, what is the meaning of the arrangement? It means this: the surviving or continuing partners are liable by law to pay immediately; they are to have time, and to pay by instalments. The surviving or continuing partners are liable by law to pay the actual value of the share of the dead or retiring partner at the time of the dissolution: that is inconvenient; and they say we will adopt the last stock-taking, not as a new amount, but

(¹) 2 Russ. & My., 495.

as fixing the amount, instead of taking the account over again, and if that is not possible, then we will have a new stock-taking at a subsequent day. In neither case will we take the exact mode of ascertaining the amount payable, but we will vary the mode so as to make it more convenient. The arrangement is nothing more or less than providing for the payment of the share of the deceased partner (for I confine my observations now to a dead partner), by altering the date of payment and the mode of taking the account. It does not in substance vary from what the law would have prescribed, except in those two particulars. It *is, in [572 fact, a mode of regulating the payment of a debt rather than the creation of a new one.

Now upon that point I think there is plenty of authority, if authority were wanting. In the case of *Bishop v. Church* (¹) a joint bond was given. Of course a new day of payment was in the joint bond, but no one suggested, because you varied the day of payment, that made it a new debt, that is, you were not to look to the consideration for the bond, and in fact it was decided that the consideration of the bond being a partnership debt, the obligation created by the joint bond was not joint only, as it was at law, but joint and several in equity. I do not think in any of the cases the mere fact of the variation in time of payment has been considered material for this purpose.

But is it material to consider whether the variation in the mode of taking the account makes any difference? I should say certainly not. The mode adopted by the Court of Equity is exceedingly inconvenient. You actually sell and realize everything, and break up the partnership business, so to say, before you can ascertain what is due. The very object of the partners was that this should not be done. Some other mode of valuing, therefore, must be adopted, some kind of valuing instead of actual sale. They take the valuation made by the partners themselves immediately before the event happened, or if none such, then at the last stock-taking. That is evidently only another mode of ascertaining what is due, a more convenient mode, and one which suited their object, which was to continue the partnership business. But it is mere modification—it is not a new liability created; it is a mode of ascertaining the amount and extent of the liability, and a more convenient mode also of securing its payment. My view of the instrument is that it was not intended to effect anything more; that it was in

(¹) 2 Ves. Sen., 100, 371.

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reality nothing but an arrangement as to the mode of discharging a pre-existing liability.

If that view is correct, it is hardly necessary for me to consider whether at law an action could have been maintained against each of the surviving partners separately, or whether they must all have been joined as defendants in the same action; because it is quite clear that in equity the 573] original liability was joint and several. *No one doubts for a moment that the liability of the three surviving partners who have taken possession of the partnership assets to account to the executor of the deceased partner is not destroyed by the fact of two of those surviving partners dying before the account is taken. In fact, the phrase describing the nature of that equity is now too familiar to all of us to suppose that any one ever doubted such a proposition.

Consequently, at the time when this new arrangement was made, there was, or, more properly, there would be, on the surviving partners a joint and several liability to pay out the share of the deceased partner, and the arrangement was that this joint and several liability should be altered in point of time, and should be altered in point of ascertainment of its amount, and nothing more. Therefore it appears to me that this is a joint and several liability.

With regard to the actual legal question, I say it is not necessary to decide. Were it necessary, I should say I can find nothing in this agreement to make it joint; but it is as well to consider one or two of the authorities which have been cited for the respondents, and which, it is said, show where you take a security for the payment of a partnership liability, and that security is in form a joint one, that it destroys the several liability which exists in equity.

It is very difficult to say exactly how the doctrine came into our law. I see that Sir William Grant, in the case of *Devaynes v. Noble, Sleech's Case* (1), assumes it came into our law from the law-merchant, and if so, it would be confined to the case of a mercantile partnership. He says (2): "It may be proper, however, to observe that the common law, though it professes to adopt the *lex mercatoria*, has not adopted it throughout in what relates to partnership in trade." Then he goes on to say: "whereas I apprehend, by the general mercantile law, a partnership contract is several as well as joint." I am not going to say this court has extended that doctrine to all partnerships. It is not necessary to decide that now. But the law, as laid down

(1) 1 Mer., 539.

(2) 1 Mer., 564.

by Sir William Grant, has never been questioned that it certainly extends to all mercantile partnerships. There all partnership contracts are *several as well as joint. [574 Such a contract must be a partnership contract entered into by mercantile parties, and of course for partnership purposes, otherwise it would not be a partnership contract.

I have found no case at all against that authority. In *Sumner v. Powell* (¹), which was decided by the same judge and in the same year as *Sleech's Case* (²), there was a mercantile partnership. The new partner who was taken in by the surviving partners agreed to indemnify the executors of the deceased partner from a breach of trust committed by the old firm, but at the same time the whole of the share of the deceased partner was paid out to the legal personal representative. That is very material; for it follows that, independently of the contract itself, there was no liability on the part of the surviving partners to indemnify the estate of the deceased partner. But, in addition to paying him the whole of his share irrespective of the breach of trust, as to which they would have been entitled to contribution, they also agreed, together with the new partner, to indemnify his estate from the consequences of the breach of trust. That, therefore, was an entirely new contract, quite irrespective of the then existing liability; and, as the covenant was joint, Sir William Grant did not see any reason for making the new contract wider in its terms than it professed to be, the liability being merely a creation, so to say, of the agreement or deed itself. But, in addition to that, you have this, that the contract with the new partner to pay the antecedent liability was not for a partnership debt at all. It was not a partnership debt of the partnership, in which he was a partner, it was a partnership liability of the old firm in which he was not a partner; so that the agreement, which was a joint agreement, not merely by the surviving partners, but by themselves and the new partner, was not an agreement by partners to pay a partnership liability. It came under another category. That Sir William Grant so considered it is plain from his judgment. He says, after referring to the late case of *Devaynes v. Noble*, which I cited first (³): "When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership *debt has been [575 treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But there all have had a benefit from the money advanced or the credit given,

(¹) 2 Mer., 30.(²) 1 Mer., 539.(³) 2 Mer., 36, 37.

and the obligation to pay exists independently of any instrument by which the debt may have been secured. So where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation"—referring to *Bishop v. Church* (¹), and that class of cases. He evidently there does not consider the fact of the bond being at a future day would make any difference at all. "But in this case the covenant is purely matter of arbitrary convention growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken. Instead of winding up the partnership concern, and dividing what might remain after satisfying all claims upon it, the parties make an arrangement by which Mr. Sumner was immediately to receive what was estimated to be his testator's share of the joint estate, he releasing to the other partners all interest in the residue. Why was Mr. Sumner's share of the partnership estate to remain unaffected by any claims by which that estate might afterwards be diminished? There was no equity that entitled him to demand from the other partners an engagement to that effect. But they are contented to give him a covenant of indemnity. As it is only a joint covenant that is given, how can I say that it is anything more than a joint covenant that was meant to be given?" He does not deal with the other point, which was not argued before him, and say whether the covenant was such as to make it a new agreement by the new partner. The answer would have been, that is not a partnership contract for something the partnership has received, for the new partnership had never received anything. It was an indemnity against a liability as to which the old partners had actually paid out the share to the executors of the deceased partner. It was giving him something over and above that to which he by law, or rather equity, was entitled.

It appears to me, therefore, that the case does not cover the present, or rather, when rightly considered, it is a decision the *other way, because the ground of distinction being that the partners were properly liable to pay what they covenanted to pay, it shows that Sir William Grant thought that, had they previously been liable, the mere fact of giving further time or ascertaining the amount at once would not have altered the nature of the agreement.

The other case referred to is one much more difficult to deal with, the case of *Wilmer v. Currey* (²). In the first place it is to be noticed that there the partners were not

(¹) 2 Ves. Sen., 100, 371.

(²) 2 De G. & Sm., 347.

mercantile partners. I cannot say whether that did or did not influence the judge in the decision to which he came; but it is a noticeable fact that they were attorneys. The next think is, there was not at that time any pre-existing obligation. It was an existing partnership. One partner retired and sold his share to the other two partners for a sum of money. They owed him nothing, there was no pre-existing debt, nor was there any existing liability. He sold them his share for a sum of £3,222 16s. 6d. "to be paid and secured in such manner as is hereinafter expressed;" and the expression was a joint covenant. It was not, therefore, for money, but for money to be paid and secured in the manner therein expressed. In fact, he sold it for a joint covenant, and that was the contract; and it was held, as he sold it for a joint covenant, he got a joint covenant, and nothing more. The only point that appears to me to have been arguable in favor of the plaintiff on those pleadings was that the joint covenant was a covenant by partners in a continuing partnership who were to take over the share of the assets, and in that way it would have been a contract by partners, that is, a partnership contract for value received by the partnership, and within, therefore, the general proposition laid down in *Sleech's Case* ⁽¹⁾. I do not, however, find that point argued by counsel: nor is it discussed in the judgment. I cannot, therefore, hold this to be a decision that the second point was not a good one, because it is not noticed either in argument or judgment; and it appears to me that if this had been a mercantile partnership, the handing over the assets to a new firm in consideration of a covenant by the firm might have been held to *create that [577] kind of partnership contract for value received by the partnership which would have created a joint and several liability. All I can say is, that *Wilmer v. Currey* ⁽²⁾ does not decide the point. It may well be that the Vice-Chancellor, and the counsel also, thought the rule did not apply to a partnership between attorneys, and therefore did not argue the point; but certainly it is no decision.

The only other case referred to is a very curious case of *Clarke v. Bickers* ⁽³⁾, in which the Vice-Chancellor Shadwell held the covenant of two pawnbrokers contained in a lease to them was a joint covenant. He said that the lessors, although they lease to the pawnbrokers, although they describe them as partners, choose to take a joint covenant, not a joint and several covenant. He did not seem to con-

⁽¹⁾ 1 Mer., 539.

⁽²⁾ 2 De G. & Sm., 347.

⁽³⁾ 14 Sim., 639.

sider it was a partnership contract. Whether that was so or was not, I do not know, but the decision was that it was not. The case is very short, and it does not at all militate against the view which I entertain. Therefore the general rule remains, that a partnership contract for value given to the partnership, being a mercantile partnership, is joint as well as several.

Now, how would that apply to the second part of this case. Supposing that the first set of considerations were out of the way on which I have already decided in favor of the applicant, and supposing it were a new agreement, as it has been argued before me, what does the agreement amount to? It is an agreement by three persons who are to continue to carry on a partnership business of a mercantile character that in consideration of a sum of capital or share of the assets handed over to them they will pay a sum of money. Even supposing those words made it joint at law, still, on the general principle as laid down by Sir William Grant, it would be joint and several in equity, it being a mercantile contract for value given by the firm to pay a sum of money. Were it a new contract instead of being a mere modification of the old contract, it appears to me it would come within the general line of cases that every mercantile contract for value given by the firm is in equity joint and several, although in form it may be joint at law. That accounts for 578] the cases as to bonds and promissory notes and *bills of exchange, in which, in equity, a creditor has been allowed to sue. So that even in that view I think the claimant ought to succeed.

But then it has been said that there are words of express contract in this agreement which destroy the liability which previously existed, and which would prevent the liability arising as regards several liability if it were a new contract. Now he who asserts that the legal liability has been released or destroyed must show it plainly. As regards the old liability, it appears to me that the whole tenor of this instrument is against this construction, that the object is not to destroy it but to secure it, at the same time to give time to the persons liable to pay. The recital is that it will be impracticable or highly detrimental to the others to repay or advance from the business immediately after the retirement. Then the agreement is that they would not be compellable to repay immediately, but the clear balance was to be paid at certain intervals. The "immediately" contrasts with the intervals and the time for payment of the instalments,

and, so far, therefore from intending to release the liability, as I said before, it appears to me the whole tenor of the instrument is simply to defer it as regards the time of payment, and to regulate it as regards the mode of ascertainment. I think, therefore, there are no words at all to help the respondents. But it is said that the words are "to be paid by the continuing or surviving partners out of their business," and that that means that he is to look to the business carried on from time to time by the partners. But the word "business" there is evidently the capital. It is that "in such a case they shall not be compellable to pay his or their share in the partnership business immediately." Now "his share in the partnership business," the man being dead, must be the share to which he is entitled of the assets of the business, because being dead he has no share in the continuing business which is carried on by another partnership. Then it proceeds: "but the clear balance shall be repaid out of the business." Surely it would be a strange construction to read this as meaning that the interest of the deceased partner in the business (that is, his share of the partnership assets) is to be paid out of the business from time to time to be carried on by any number of suc- [579] cessive partnerships, and to leave him, or rather his estate, looking, not to the partnership assets, to a share of which he was entitled when he died, but to the chance of the thing being carried on for thirty years by successive partners of whom he knew nothing. This would be a very strange construction, and it appears to me it is not the natural or the proper construction. The words do not, as I think, mean that the payment is to be restricted to the business from time to time carried on by the partners for the time being, quite irrespective of how many die, or of what sums are drawn out of the capital; but as I said before, those who say that liability is released are bound to show it by clear evidence, especially when the consideration, as far as I can see, is all the other way. The consideration is the giving of time to the partners for their convenience, not giving anything to the person whose executors are supposed to release the liability. Of course there is an observation to be made in answer to that, which I had not forgotten, that it is mutual, and therefore every one might expect to get a chance of the same benefit. But that does not make the construction contended for more probable, and I think that it is not the true construction of the instrument.

As, therefore, there is no term in this agreement which

overrules the antecedent liability, or says that the new liability, if it were a new liability, is to be restricted in the way I have mentioned, I hold it to be a several obligation on the surviving partners.

Solicitors: *Mr. R. Smith; Messrs. Walker & Battiscombe; Mr. G. H. K. Fisher; Mr. William Sturt.*

See 4 Eng. Rep., 928 note; 10 Eng. Rep., 534 note; *Matter of Dixon*, 11 Eng. Rep., 513, 520 note, affirmed 1 Appeal Cas., 195, ante, p. 70; *Vyse v. Foster*, 11 Eng. Rep., 1; *Owen v. Delamer*, 5 Eng. Rep., 765.

The representative of a deceased party may sell the good-will of the decedent in a business as assets and must account therefor, though it seems the representative cannot be compelled to do so: *Christie v. Clark*, 16 Upper Can. Com. Pl., 544; Same parties, 27 U. C. Q. B., 21; *Cameron v. Francisco*, 28 Ohio St. R., 190.

Executors finding it to be beneficial to the estate of a deceased partner to pay the surviving partner a certain sum for his interest in the partnership effects and themselves to wind up the partnership; the executors became personally liable to the survivor for such sum and wound up the partnership, and applied the proceeds in liquidation of the testator's debts. This arrangement was found by the master, on reference, to be beneficial to the testator's estate. The executors were held to be entitled to a first charge on the proceeds of the estate for the moneys so paid by them to the surviving partner, and for what they still owed him on their personal obligation: *Harrison v. Patterson*, 11 Grant's (U.C.) Chy., 105.

A court of equity has jurisdiction in an administration suit to direct a trade or business in which minors are interested to be continued, and will so direct if it be clearly for their benefit: *Perry v. Perry*, Irish L. R., 3 Eq., 452.

A testator's direction to his executors to continue to carry on business with his surviving partners, does not authorize the executors to embark any new capital in the business, and only his capital in at his death can be reached by creditors: *Smith v. Smith*, 13 Grant's U.C.) Chy., 81; *McNellie v. Acton*, 4 De Gex, Macnaghten & Gordon, 744; *Pitkin v. Pitkin*, 7 Conn., 307.

Though the testator may by apt and appropriate language empower his executors to embark other assets therein: *Burwell v. Mandeville*, 2 How. U. S., 560.

If the executor continues the decedent's share in the business he is liable personally, and not in his representative capacity, for the debts of the company: *Alsop v. Mather*, 8 Conn., 534.

A trader bequeathed to his nephew T. the house and concerns in which he carried on his business, together with the stock, etc., subject to his legacies and the annuity to his wife, the annuity to be paid to her by T. out of the profits of the business "to be carried on by T." in the testator's house; and in case T. should "at any time wish to discontinue carrying" on the business, the testator directed that his said wife should be paid £1,000 in full for all claims, and that her annuity should thenceforth cease. He bequeathed several legacies and appointed T. his executor and residuary legatee. T. continued to carry on the testator's trade and became bankrupt: Held, that the will contained such a direction to carry on the business as would, on T.'s bankruptcy, peril the trade assets existing, at the testator's death, to the prejudice of the legatees: *Hall v. Fennell*, Irish L. R., 9 Eq., 615, reversing *Id.*, 406.

After the death of a partner two of his administrators sold the interest of the decedent in the firm at private sale to a surviving partner, who was also an administrator, at less than the value. Held, that the sale was voidable at the election of any party in interest, and all the administrators were chargeable with the actual value. That the administrators acted in good faith and under the advice of counsel, would not justify the transaction: *Gilbert's Appeal*, 78 Penn. St. R., 206.

Where the surviving partner is charged, in favor of the representatives of a deceased partner, with interest or

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profits, a reasonable allowance may be deducted from such profits as a compensation to the survivor for his services: *Cameron v. Francisco*, 26 Ohio

St. R., 190; *Schenkl v. Dana*, 118 Mass., 286.

And such allowance should be liberal: *Thompson v. Freeman*, 15 Grant's (U.C.) Chy., 384.

[Law Reports, 20 Equity Cases, 599.]

V.C.M., July 14, 1875.

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[1875 T. 22.]

Appointment—Special Powers—General Words—Reddendo singula singulis.

A testator gave his estate by will to trustees in the following words: "I give, devise, and bequeath all my property over which I have any disposing power." The trusts of the will were for his wife for life for her separate use, and after her death for all his children who should attain twenty-one in equal shares, and upon failure of children for the brothers and sisters of his wife;

Held, that the will must be read *reddendo singula singulis*, and operated as an appointment under two special powers, one of which was a power to appoint among his children subject to a life interest in his wife during widowhood; and the other was a power to appoint a life interest to his wife in a fund which, subject to such power, was held on trust for his children at twenty-one in equal shares.

SPECIAL CASE. By a family settlement of the 18th of October, 1870, and made between Thomas Thornton the elder of the first part, Thomas Thornton the younger of the second part, and certain trustees of the third part, it was declared that the trustees should hold a sum of £10,000 Reduced 3 per Cent. Annuities, which was recited to have been transferred into their names, upon trusts therein mentioned as to investment and the settlement proceeded as follows: "And shall pay the dividends, interest, and income of the said bank annuities, and of the moneys, stocks, funds, and securities into or for which the same or any part thereof may be converted or transposed by monthly instalments or payments unto the said Thomas Thornton the younger during his life for his own use, and so that he shall have no power to anticipate the growing payments thereof, and his receipt alone to be a good and sufficient discharge to the said trustees or trustee, or until the said Thomas Thornton the younger shall become bankrupt or take the benefit of the act for the relief of insolvent debtors; and after his death, or in the events aforesaid, in case he shall leave a widow him surviving, upon trust to pay the said dividends, interest, and annual income unto such widow during her life, or until she shall marry again, *for her sole and separate use, so that her receipts alone [600 shall be good discharges for the same; and that she shall not have power to deprive herself of the benefit thereof by

sale, mortgage, charge, or otherwise, in the way of anticipation; and from and after the decease or second marriage of such widow, or the bankruptcy or insolvency of the said Thomas Thornton the younger, the said trustees or trustee shall stand possessed of the said bank annuities or trust fund, and the dividends, interest, and annual income thereof, in trust for all or such one or more exclusively of the other or others of the issue of the said Thomas Thornton the younger to be born during his life or within due time after his death, at such age or time or respective ages or times, if more than one, in such shares and with such future and executory or other trusts for the benefit of the said issue, or some or one of them, and with such provisions for their respective maintenance, education, or advancement, at the discretion of the said trustees or trustee for the time being, and upon such conditions, with such restrictions, and in such manner as the said Thomas Thornton the younger shall by will or codicil appoint; and in default of such appointment, and so far as no such appointment shall extend, in trust for all the children or any the child of the said Thomas Thornton the younger who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, if more than one in equal shares."

Thomas Thornton the elder, by his will, dated the 14th of July, 1865, made certain dispositions not necessary to be stated, and by a codicil to his will dated the 5th of October, 1868, he provided as follows: "I hereby revoke the before-mentioned devises and bequests and all others contained in my said will (if any) in favor of my said sons William West Thornton and Thomas Thornton, and in lieu thereof I give and bequeath unto the trustees or trustee for the time being of my said will two several sums of £20,000 £3 per Cent. Consolidated bank Annuities, upon trust from time to time to pay the interest, dividends, and annual income of one such sum of £20,000 to each of my said sons William West Thornton and Thomas Thornton during his life, or until he shall 601] execute any charge, incumbrance, or alienation *thereof or any part thereof, or the same or any part thereof shall be or become assigned or charged or assignable or chargeable, or but for this clause would be or become assignable or chargeable by operation of law, and after his decease, or any such charge, incumbrance, alienation, or assignment, upon trust for such of his children as shall attain the age of twenty-one years, and if more than one, in equal shares as tenants in common; and in case he shall have no child who shall

live to attain a vested interest under the trusts aforesaid, upon trust for the person or persons who, under the Statutes of Distribution, would have been entitled to his personal estate if he had died a bachelor and intestate, and if more than one, in like shares. And I declare that, notwithstanding anything herein contained, it shall be lawful for each of my said sons who shall leave a widow surviving him, by his last will and testament, or any codicil, to bequeath or appoint the dividends or income of the said trust moneys hereinbefore bequeathed in trust for him, or any part thereof, to her or for her benefit for the whole or any part of her life."

Thomas Thornton the elder died on the 7th of November, 1870, and his executors set apart the £20,000 legacy bequeathed for the benefit of Thomas Thornton the younger.

Thomas Thornton the younger, in April, 1873, presented a petition for liquidation of his affairs in bankruptcy, and thereupon the trustees of the settlement and will ceased to pay him the income of the trust funds. He died on the 13th of November, 1874, having made his will, which was dated the 11th of October, 1871, and was as follows:

"I, Thomas Thornton, of Sutherlands, Warmington, in the county of Sussex, gentleman, do declare this to be my last will and testament. I give, devise and bequeath all my property over which I have any disposing power at my decease unto my wife Helen Maria Thornton, and Samuel Thomas Frieggle and Henry Cheswick Frieggle, both of Croydon, in the county of Surrey, gentlemen, their heirs, executors and administrators, upon trust to hold my said property and pay the annual income thereof to my said wife for and during her life for her own sole and separate use independent of any future husband, and after her decease upon trust for all my children, or any my child who shall live to attain the *age of twenty-one years, in [602 equal shares, and if only one such child shall live to attain that age, then the whole to such my child; and on failure of such child living to attain the said age, then the said trustees or trustee for the time being of this my will shall hold the said property and the annual income thereof upon trust for the brothers and sisters of my said wife in equal shares and proportions."

The special case was filed by Helen Maria Thornton, the widow of Thomas Thornton the younger, against the children, and asked the opinion of the court as to whether the

will of Thomas Thornton the younger operated as an appointment of either or both the funds.

Mr. *Everitt*, for the plaintiff: This case falls within the rule laid down in *In re Teape's Trusts* ⁽¹⁾, where, although the words of the appointment conferred a larger estate than was warranted by the power, the power was held to be well exercised so far as the provisions of the appointment were consistent with it. That case only followed the previous decision in *Ferrier v. Jay* ⁽²⁾, where there was a direction for payment of debts, and a special power which did not allow of that provision was held to be exercised by applying the principle of *reddendo singula singulis*, and allowing the debts to be paid out of the portion of the testator's property liable to pay them.

Mr. *Glasse*, Q.C., and Mr. *Stock*, for the children: *In re Teape's Trusts* was a case of a simple excess in the extent of the interest purported to be granted by the appointment over that of the power. So in *Ferrier v. Jay*, by treating the words directing the payment of debts as applicable only to the part of the estate which could be so dealt with, the difficulty was obviated. So also in *Cowx v. Foster* ⁽³⁾. Here there is a twofold difficulty, the appointment being consistent with neither power. The provisions of the will are not sufficiently applicable to either power to afford evidence of an intention to exercise it.

603] *SIR R. MALINS, V.C., after stating the facts, continued: Under the settlement the plaintiff takes a life interest during widowhood, independently of any appointment. Under the will of Thomas Thornton the elder she only takes an interest if her husband gives it to her. Similarly, under the settlement there is a power to appoint amongst children, while under the will there is no such power.

Now the questions are, whether the will of Thomas Thornton the younger operates as an appointment, first, under the will, and secondly, under the settlement. I must attribute to him knowledge of the settlement, and of his father's will. I must also attribute to him the intention of so arranging his property that it should go to his wife for life and then to the children. I must also assume that he had a competent knowledge of the law. Now he describes the property he intends to deal with as "all my property over which I have any disposing power." Those words are extensive enough to include property over which he had a

⁽¹⁾ Law Rep., 16 Eq., 442.

⁽²⁾ 1 J. & H., 30.

⁽³⁾ Law Rep., 10 Eq., 550.

special power of appointment, but as he had made a disposition not consistent with either of his powers, the question again arises which I had before me in *Ferrier v. Jay* (¹), and which was also considered by Lord Hatherley when Vice-Chancellor in *Cowx v. Foster* (²), and by Lord Selborne, sitting for the Master of the Rolls, in *In re Teape's Trusts* (³).

The result of these cases is, that the will operates as an exercise of a special power if it embraces all the objects of the power. In *In re Teape's Trusts*, where a wife would take no interest except under an exercise of a special power of appointment, the power was held to be well exercised by general words, though the words of appointment were rather more extensive than was consistent with the power. In *Ferrier v. Jay* I had also decided that an appointment in general words would extend to a special power, where the appointment was in favor of the objects of the power, though there were provisions inapplicable to it.

The difficulty I had to contend with in *Ferrier v. Jay* arose by reason of the testator in the first instance charging his property with the payment of his debts; but applying the rule of *reddendo singula singulis*, I attributed [604 the charge of debts to the property which could be so charged, leaving the appointed property to go according to the appointment. Mr. Glasse argued that the words in the will did not indicate an intention to exercise the special power. But when the testator speaks of all the property over which he has any disposing power, I think he does show an intention to exercise a special power. It is true that there is also the gift over to collateral relations. But applying the same principle of *reddendo singula singulis*, that part of the will may be held applicable to property which he could so dispose of. Therefore, on the authority of all the three cases of *Cowx v. Foster* (¹), *Ferrier v. Jay* (¹) and *In re Teape's Trusts* (³), I am of opinion that there is nothing in the will to prevent it from being an exercise of the power in the former will.

With regard to the settlement there is more difficulty, because a life interest is given to the widow till re-marriage, and the husband has no power to appoint anything to her. What he has is a power to distribute the fund amongst the children, and he in fact leaves the fund to go equally amongst those who attain twenty-one.

But he says that he gives all his property over which he has any disposing power. If he had simply directed that

(¹) Law Rep., 10 Eq., 550.

(²) 1 J. & H., 30.

(³) Law Rep., 16 Eq., 442.

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it should go to the children at twenty-one, I think it would have been clear that he intended to execute the power; and on the whole I am of opinion that, acting on the rule on which *Ferrier v. Jay* was decided, I may distribute the provisions of the will amongst the funds to which they are applicable. Applying the principle I have mentioned to this case, I hold that he has exercised the power under his father's will to appoint a life interest in the fund bequeathed by it to his widow, and has also exercised the power given by the settlement to appoint amongst his children.

On these grounds, therefore, I hold that both the powers are well exercised.

Solicitors : Messrs. *Jones, Arkcoll & Jones.*

[Law Reports, 20 Equity Cases, 620.]

V.C.B., May 22, 27, 28, 29, 31; June 2, 1875.

620] **In re* BRAMPTON and LONGTOWN RAILWAY CO.

ADDISON'S CASE.

Companies Act, 1862, s. 109—Winding up—Contract of Indemnity—Authority of Agent.

Under the jurisdiction to adjust the rights of the contributories amongst themselves given by the Companies Act, 1862, s. 109, the court will not under the winding up enforce an alleged contract by the promoters to indemnify persons signing the subscription contract against all liability in respect of the shares, by directing a call payable primarily by the promoters only.

The authority of the clerk of a solicitor engaged in getting up a railway company to bind the company by a representation to persons signing the subscription contract that they would not be called upon to pay anything unless the line was made and opened, discussed.

ADJOURNED SUMMONS on behalf of contributories under the winding up of the Brompton and Longtown Railway Company, that the names of Messrs. Shaw, Nimmo, and McNay, be placed on a separate list of contributories for the number of shares appended to their names respectively in the list of contributories, and that the names of the applicants be also placed in a separate list of contributories for the number of shares appended to their names respectively on the said list; and that directions might be given for making calls on the contributories in the first of such separate lists in priority to those whose names should be placed on the second of the separate lists, and such other directions as might be necessary for adjusting amongst themselves the rights of the contributories whose names should be placed on such separate lists.

The material facts are stated in the report of *Shaw's*

Claim (¹), from which it appears that the Brompton and Longtown Railway was projected before 1865, and actively promoted by Messrs. Dodds & Hendry, the parliamentary agents; Nimmo & McNay, the engineers; Shaw, the solicitor; and Boulton & Dodds, railway contractors. Waugh and other owners of land along the proposed *line con- [621] sented to allow their names to appear as provisional directors upon receiving from Shaw, Nimmo, and McNay, a written guarantee against liability for any expenses incurred prior to the passing of the act.

During the progress of the bill through Parliament it was considered desirable to obtain signatures to the subscription contract as evidence of the pecuniary support given to the undertaking by persons residing in the locality through which the line was intended to pass, and also to meet the requisitions of Lord Redesdale, as chairman of committees.

Shaw, who was the solicitor to the undertaking, was actively engaged in procuring signatures to the subscription contract, and represented to Waugh that the contract, if signed, would not be used or acted on unless the line were made. On the faith of this representation, and on the repeated assurance by Norris (a clerk of Shaw's) that he (Waugh) should not be called on for a penny unless the line was made, and that the contract was only for the purpose of getting the bill safely passed, Waugh signed the subscription contract. The applicants (Messrs. Addison and others) who had signed the subscription contract, stated that they had been induced to do so by representations made to them by Norris, and his positive assurance that they should not incur any liability, or "be called upon to pay one penny of expenses" unless the line was made and opened, or unless the undertaking was carried out. The act was passed in 1866, but it being found impossible to proceed with the undertaking the construction of the line was never commenced, and the undertaking was abandoned under 30 & 31 Vict. c. 127. In December, 1869, an order was made under 32 & 33 Vict. c. 114, for winding up the company.

Claims having been carried in under the winding up by Shaw for professional services (£858), and by Nimmo & McNay for engineering work (£1,000), these claims were resisted by Waugh and the other persons who had signed the subscription contract, on the ground that they had been induced to sign by the misrepresentations and assurances of Shaw and Norris, as agents of Shaw, Nimmo and McNay.

(¹) Law Rep., 10 Ch., 177.

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The claims were allowed by Vice-Chancellor Bacon, and on the 11th of January, 1875, the Vice-Chancellor's decision [622] was affirmed *by the Court of Appeal (¹), their Lordships being of opinion that the engagement, even if proved, was an engagement to indemnify the particular shareholders individually, and had not the effect of exonerating the company in its corporate capacity. In dismissing the appeal the following words were added, "But this order is to be without prejudice to any claim of the said alleged contributories which they may be advised to make on the ground of indemnity."

The names of Waugh and the other persons who had signed the subscription contract under the above stated circumstances having been placed on the list of contributories, the above summons had been taken out and was now adjourned into court.

Mr. *Fry*, Q.C., and Mr. *T. L. Wilkinson*, for the applicants: A contract on the part of Shaw, Nimmo and McNay, as promoters, to indemnify the persons whom they induced to sign the subscription contract against all liability in the event of the line not being made and opened, has been clearly established; and the court will give effect to it and adjust the equities between the contributories by dividing the indemnifiers and the indemnified into two classes, and making a call in the first instance upon the indemnifiers only, and not upon the general body until the former class has been exhausted: *Lindley on Partnership* (²); *Companies Act, 1862, s. 109*. The representations shown to have been made by Norris were made by Norris acting entirely within the scope of his authority as agent for the promoters, for the purpose of obtaining signatures to the subscription contract: and having been held out to the persons whose signatures were obtained as an agent having competent authority, his principals, the promoters, now represented by the company, are bound by the contracts made by him "although, in fact, he has in the particular instance exceeded or violated his instructions, and acted without authority:" *Story on Agency* (³).

Mr. *Kay*, Q.C., and Mr. *Smart*, for Shaw, Nimmo and McNay: We deny that there was ever anything amounting to a contract to indemnify the persons who signed the subscription contract *against any sums they might be called upon to pay in their character of shareholders; and it has been already stated in the Court of Appeal (⁴) that the

(¹) Law Rep., 10 Ch., 177.

(²) Pages, 1473, 1474.

(³) § 443.

(⁴) Law Rep., 10 Ch., 182.

evidence, even if accepted as uncontradicted, does not amount to anything entitling the applicants to say more than that there has been an engagement to indemnify them as individuals.

Any representation such as is alleged to have been made by Norris was not within the scope of his employment as agent, was in excess of the authority committed to him, and, even if authorized by any instructions from his principal, cannot have the effect of binding the company: *Western Bank of Scotland v. Addie* ('); *Collen v. Gardner* ('); *Duke of Beaufort v. Neeld* ('); Story on Agency (').

But even assuming the existence of such a contract, and the authority of Norris to make it, there is no authority for making a call under the winding-up for the purpose of enforcing a mere collateral contract of indemnity. No such right can be asserted under the Companies Act, 1862, sect. 102, which gives the court power to make calls "for the adjustment of the rights of the contributories amongst themselves," or under sect. 109: "The court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain among the parties entitled thereto;" for the equity now asserted is not between contributories in that capacity, but in respect of a contract of indemnity alleged to have been given by persons who only subsequently became shareholders.

Even if such a contract could be enforced, the rights of the parties would not be adjusted, as the total amount payable on the shares of Shaw, Nimmo, and McNay would not be sufficient to satisfy the debts of the company already proved.

Mr. *Kay*, Q.C., and Mr. *Millar*, for the official liquidators.

Mr. *Fry*, in reply: 1. Although it has been decided by the Court of Appeal that there was no contract which enured for the benefit of the *company, the decision was [624 expressly without prejudice to the question of indemnity to the particular shareholders.

2. It is said that at the utmost there has been a representation, and not a contract, but where a person makes a representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act upon it, equity

(1) Law Rep., 1 H. L., Sc., 145, 157.

(3) 12 Cl. & F., 248.

(2) 21 Beav., 540.

(4) § 105.

will bind him by such representation, treating it as a contract: *Maunsell v. Hedges* ⁽¹⁾.

3. The court has jurisdiction, as in the case of a partnership (where there has been an agreement by some of the partners to indemnify the others), to work out the equities between the parties by making such a call as will put all the different parties upon a rightful footing: *Re Marylebone Joint Stock Bank* ⁽²⁾.

SIR JAMES BACON, V.C.: In my opinion there is no ground upon which I can with safety accede to this application. On the former occasion, when, as has been truly said, the case of Mr. Waugh was that misrepresentation had been made to him, I was satisfied that no misrepresentation had been made. The case afterwards went to the Court of Appeal, and there, as has been truly said and was agreed on both sides, the decision went on the ground that if all that was stated in the affidavits were true that amounted to no more than an engagement to indemnify certain persons as individuals. Whether there had been such an engagement or not the Lord Chancellor and the Lords Justices forbore to express any sort of opinion.

Upon the facts of the case I am of opinion that it was out of all possibility or plausibility to suppose that any person who signed that contract signed it on the understanding that he was to acquire the property which the shares would represent without the disbursement of a shilling or the liability to contribute a shilling. But, even assuming these representations to have been made, Norris was merely an attorney's clerk sent down for a special purpose clearly defined, with an authority to do all that was requisite in the character of an attorney's clerk to procure signatures to the 625] subscription contract. No doubt he expressed *himself very favorably towards the undertaking; but what authority had he to say, "On behalf of my master, and on behalf of the persons who are associated with him as promoters of the undertaking, I agree to hold you harmless from all the consequences of signing this contract. More than that; I agree that if you should be called upon to pay any money, and shall pay it, my master and the others shall pay it back again." For such an authority there must be some proof. Proof there was none, and it was denied that any such authority was given. It would be unsafe and unjust in the highest degree to adopt the conclusion of these applicants, and hold that they were entitled in the winding-up of this company to have the performance of what they

⁽¹⁾ 4 H. L. C., 1039, 1055.

⁽²⁾ 25 L. J. (Ch.), 630.

called the indemnity entered into by these three persons enforced.

Then the question of jurisdiction is raised, and upon the policy of the Winding-up Act, *Re Marylebone Joint Stock Bank* (') is referred to; but that case, in my opinion, has no application at all, because upon general principles of equity, in a common partnership, if there were equities to be ascertained and determined between the parties to the partnership, the court would find the means of doing that. The applicants say that they have got a contract of indemnity, and have a right to enforce it. No one says that if they have a contract for indemnity they are not entitled to enforce it. The law is open to them; but are they entitled to enforce it under this winding-up? The act has said that the rights of the parties shall be determined and settled, and the rights alleged do not arise out of this winding-up. The subscription contract having been entered into, the undertaking is not carried on for some reason or other. But if the case of the applicants were established ever so much, what has that to do with the winding-up? In my opinion it does not come within the words or the meaning of the statute. And if I entertained any doubt about that, I should still, considering the danger of making a precedent of that nature, hesitate very much before I made an order; inasmuch as the right of working out the indemnity, as it is called, in the winding-up, might with equal plausibility be extended to any other right of action in tort, trespass, debt, or other proceeding. I do not think that was the meaning of the act of Parliament; but I think the meaning is sufficiently apparent, and the case before Vice- [626 Chancellor Kindersley is a strong illustration of it, that if in the course of the transactions which have taken place between the parties there arise any special equities, those can be arranged in the winding-up. But to introduce sixty actions for indemnity, and have them determined (how they are to be determined I cannot tell), is, in my opinion, not within the meaning of the act of Parliament. Although the suggestion is at least ingenious, and it may be said to be in some sense plausible, the contrivance of making separate lists, the object being to cast the burden on the persons who should thereby become liable to contribute in the first instance, viz., the present respondents, ought not, I think, to be adopted. In my opinion, I cannot and ought not to accede to the application now made, and I therefore dismiss the summons with costs. It will be understood that my

(') 25 L. J. (Ch.), 650.

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refusal to entertain this claim under the winding-up does not prejudice, or alter, or affect in the slightest degree any right of action that any of these parties may have against any person they may choose to sue, but I will not put such words into the order.

Solicitors: *Mr. J. Thomson*; Messrs. *Tahourdins & Hargreaves*; Messrs. *Ashurst, Morris & Co.*

See 12 Eng. Rep., 699 note. Declaration against defendant as a shareholder in a railway company for calls on stock. Plea that by the plaintiff's charter it was provided that so soon as \$100,000 stock should be taken, and ten per cent. thereon paid into a chartered bank, the provisional directors might call a general meeting, and the shareholders who had paid such ten per cent. should elect directors and organize the company; that one D. acting in collusion with the provisional directors, to enable them to make a colorable compliance with the act, agreed to and did enter his name as a subscriber for \$30,000 stock, and to pay \$3,000 thereon, and it was agreed that he should not be called on for any further payment on said stock, and that any payment he might colorably make should be restored to him by

means of a contract for building a railway for plaintiffs, which the provisional directors then agreed to give him on such terms as would yield a large profit; that the said subscription was not *bona fide*, but in fraud of the act; and before \$100,000 stock had been taken, exclusive of such fraudulent subscription, the provisional directors called a meeting, at which D. was present and assumed to rate as a shareholder, and chose directors, who made the alleged calls; wherefore the said company has never been legally organized, and the said calls were not authorized. Held, no defence, for D. could not dispute his being a shareholder, and the alleged agreement with him being contrary to the statute could not operate: *Port Whitby, etc., v. Jones*, 31 U. C. Q. B., 170.

[Law Reports, 20 Equity Cases, 626.]

V.C.B., June 10, 11, 1875.

ATTORNEY-GENERAL V. HACKNEY LOCAL BOARD.

[1874 A. 92.]

Injunction—Pollution of Stream—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 106—Notice of Proceeding.

The provisions of 25 & 26 Vict. c. 102, s. 106, requiring one month's notice to be served before instituting any proceeding against the Metropolitan Board of Works or any district board in respect of anything done or intended to be done under their parliamentary powers, do not affect the right of a riparian owner, whose stream is being polluted by the drainage works of a district board, to summary relief by injunction.

The authority over sewers, and the drainage powers given by Parliament to local boards, do not authorize the committal of a nuisance by the boards in their exercise of such powers.

THIS was an information at the relation of J. M. Yetts, of Marsh House, in the parish of Hackney, for the purpose [627] of restraining the *defendants, the Hackney Local

Board, from draining into or connecting any sewer with a stream called the Marsh Brook, which runs from Lea's Dock through Hackney Marsh and ultimately empties itself into the Thames, bounding on the east and south of the plaintiff's property, which consists of eight acres of land occupied by a dwelling-house, orchard, garden, and paddocks.

The case made by the information was that the Marsh Brook in its original state was a stream of clean, wholesome water, full of small fish, with watercresses growing in the stream and flags on the banks.

The defendants, the Hackney Board of Works, were a local board incorporated under the Metropolis Local Management Act, 1855, and the several acts in connection therewith.

About five years back the defendants, having been restrained by injunction from pouring sewage from their district into the River Lea, turned a sewer into the head of Marsh Brook at Lea's Dock, and had more recently made use of the brook as a sewer for draining a collection of new houses (Buccleuch Terrace) which had been built in the district near the Marsh Brook. The result of these operations had been to convert the clean and wholesome water of the brook into a foul black fluid loaded with sewage matter, emitting an overpowering stench, and causing an abominable nuisance and serious risk to the health of the relator and his family and the inhabitants of the immediate neighborhood.

The existence of a nuisance was in effect admitted by the defendants, but the case raised by the answer was that the Marsh Brook had long ceased to be a watercourse, and was in reality a sewer, and as such placed under their control by the Metropolis Local Management Act, 1855, and always so treated; and that they had only acted in accordance with the duty imposed by the Local Management Acts in draining into it the sewage from new houses in the district.

The defendants also alleged that there had been undue haste, want of notice, and absence of inquiry before taking these proceedings on the part of the relator, who might have ascertained that steps were being taken, in conjunction with the Metropolitan Board of Works (now nearly carried out), which, by diverting the sewage into the Hackney Brook sewers under the control of *the Metropolitan [628 Board of Works, would abate the nuisance effectually.

The absence of one month's notice before commencing these proceedings, as required by the Metropolis Manage-

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ment Amendment Act, 1862 (25 & 25 Vict. c. 102), s. 106 (¹), was also relied on as a fatal objection to the suit.

Mr. Kay, Q.C., and Mr. *E. Chisholm Batten*, for the informant and relator: 1. The Marsh Brook, being a natural stream or watercourse formed by the drainage of pasture land, is not a sewer within the meaning of the Public Health Act (11 & 12 Vict. c. 63), so as to give the local board the right to pour the sewage of the district into it: *Reg. v. Godmanchester Local Board* (²).

2. The evidence shows that a nuisance, rendering the enjoyment of life and property uncomfortable to the relator and his family, has been created by the operations of the defendants in draining into the Marsh Brook: *Rex v. White* (³); and even though the brook may not have been an absolutely pure stream before Buccleuch Terrace was drained into it, the court will restrain the defendants from increasing and continuing the nuisance created by their operations: *Attorney-General v. Leeds Corporation* (⁴).

Mr. *Eddis*, Q.C., and Mr. *Solomon*, for the defendants: 1. Marsh Brook is a sewer, and as such became vested in the defendants under the Public Health and Metropolis Local Management Acts, with full authority and under the obligation to use it for the purpose of draining the district; [629] and the court will not *interfere with the defendants in the exercise of the duties imposed upon them by the Legislature.

2. The relator has proceeded with undue haste, as steps are being taken to connect the drainage of the district with the Hackney Brook sewer as soon as that sewer shall have been completed by the Metropolitan Board of Works—who, as we submit, are necessary parties to the suit—instead of draining into the Marsh Brook.

3. We submit that the relator was bound, before instituting this suit, to have given the one month's notice required by 25 & 26 Vict. c. 102 (Metropolis Management Amendment Act, 1862), s. 106, before any proceedings can be taken

(¹) "No writ or process shall be sued out against or served upon, and no proceeding shall be instituted against, the Metropolitan Board of Works, or any vestry or district board or their clerk, or any clerks, &c. . . . or any person whomsoever acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the said acts or this act, until the expiration of one calendar month next after notice in writing

shall have been served upon such board or vestry. . . . And upon the trial of any action the plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated in the notice so served or delivered; and unless such notice be proved the jury shall find for the defendant."

(²) Law Rep., 1 Q. B., 328.

(³) 1 Burr., 334.

(⁴) Law Rep., 5 Ch., 583.

in respect of acts done under the statutory powers given to the Metropolitan Board of Works or a local board ; and as he has not complied with the requirements of the statute, his suit must be dismissed : *Poulsum v. Thirst* ⁽¹⁾.

SIR JAMES BACON, V.C.: I think that the relator has established his title in this case, and that the Attorney-General has shown his right to institute the suit. It has been objected that no notice of an intention to commence proceedings has been given as required by sect. 106 of 25 & 26 Vict. c. 102. The policy of the law is, that if these public bodies, intrusted with powers for public purposes, in the course of executing those powers shall happen to commit any inadvertence, irregularity or wrong, then before anybody has a right to require payment from them in respect of that wrong they shall have an opportunity of setting themselves right ; they shall have the period of a month for the purpose of making amends, or for restoring if they have taken away anything, and for paying for, if they have done, any damage. That is the meaning of this clause. But what is there in it which excludes the authority of the Court of Chancery ? If we give to any proceedings contemplated by that clause the widest signification which can be desired, what has that to do with the speedy remedy which the law has given to a man who complains of an injury which can be best redressed by an injunction ? If he were to wait for a month the wrong of which *he com- [630] plains might be irreparable. The use of an injunction is to restrain a wrong which is in progress, something which is threatened ; and although in this case there has been no application for an interlocutory injunction, that is because of the nature of the defence which is set up by the defendant's answer. The case of *Poulsum v. Thirst* ⁽¹⁾ is a plain illustration of what I am saying. There an action was brought against a contractor employed by the Metropolitan Board of Works for damages sustained by his negligence in executing certain works. An injunction would have done no good then ; it was not a case for an injunction. He had made a mistake in the construction of the works, the consequence of which was that water flowed in to the injury of the plaintiff. There was no injunction ; the thing was done ; an injunction would have been useless. But the relator in this suit was bound to apply by injunction if he thought he had not sufficient redress by bringing an action for damages. If I held that where a man has an equitable title to the interposition of this court by way of injunction—the

(1) Law Rep., 2 C. P., 449.

speedy present remedy that is provided here—he is prevented from asserting that right by reason of sect. 106 of the Metropolis Management Amendment Act, 1862, it would be the first time that such an objection has succeeded, though not the first time that it has been raised. I think the contention cannot be sustained.

As to the main part of the case, it seems to be a very reasonably plain one. It is proved by unquestionable evidence that for years this watercourse contained pure water, not the most pure that could be got, but in such a state of purity that it was nothing like a public nuisance, that it was useful for the cattle who might drink of it, and was enjoyed by the persons whose lands bounded either side of it. Of late years its character has been totally changed. About five years ago the whole of the sewage from a place called Buccleuch Terrace was turned into this water with the sanction and by the authority of the Commissioners of Sewers and by the present Local Board of Health; and the effect of that is described in the reports which were made to the local board by their officers, one of whom calls it “an elongated cess-pool,” while another says that it is [631] foul and filthy to the last degree. *The act of Parliament gave to the Local Board of Health all authority over all sewers, and more than that, it gave power to direct how sewers should be constructed, how houses should be drained; and if Buccleuch Terrace, or any other newly-built houses besides Buccleuch Terrace, required to be drained, the Local Board of Health would have power to say how that drainage was to be effected; but what power had they under the act of Parliament, or in common sense or common justice, to say that because more houses have been built in the district they will add to the nuisance and injury already experienced to some extent? Having the power to construct drains, or to make the owners of houses construct drains in any way they choose to prescribe (and their powers in that respect are enormous), instead of exercising those powers, they drain the drains from Buccleuch Terrace and permit anybody else who built houses upon the bank to drain their drains into this watercourse. That is not the meaning of the act of Parliament. That is not an exercise of the powers which the Commissioners of Sewers have. I am not desirous to limit their powers in the slightest degree, for the Legislature has decided that they shall have very extensive powers; yet the Legislature has not decided, and the law will not countenance, the proposition (which indeed has not been argued on the part of the

defendants), that they are authorized to commit a nuisance. I think, therefore, that the relator is entitled to the relief which he asks, to prevent the defendants, who have the powers of dealing with the sewage in any way they think fit according to law, provided they do not commit a nuisance, from continuing that which they themselves say and prove is a very foul nuisance.

There might have been some color for the objection that the relator has been hasty in his proceedings if the defendants had raised that case by their answer, and therein stated that they were doing all they could to remedy the evil in conjunction with the Metropolitan Board of Works, and were doing it when the bill was filed. But the defendants put in an answer in which they insist upon their legal rights, and say they have done nothing that the court ought to restrain them from doing, or for which the relator can have any ground of complaint. If they choose to bring the cause to a hearing in that state, in my opinion their complaint, *that they had not notice of his intention to [632 file a bill, loses all its point and force.

There must be an injunction according to the prayer of the information; the operation, except as to that part which prevented the defendants from making any new communications being suspended until the 28th of July, 1875, and the defendants must pay the costs of the suit.

Solicitors: Mr. *J. Muskett Yetts*; Messrs. *Ellis & Crossfield*.

[Law Reports, 20 Equity Cases, 644.]

V.C.B., July 6, 7, 1875.

**In re CORDWELL'S ESTATE.*

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WHITE V. CORDWELL.

[1873 C. 174.]

Administration—Intestacy—Wife's Equity to a Settlement—Insolvency of Husband—Right to set off a Debt, partly statute-barred, against a Share under an Intestacy.

Where a husband, a journeyman carpenter, was in the receipt of wages not exceeding 12s. a week, and had to support a wife and six children, the court settled the whole of an incoming fund, the property of the wife, but liable to the extent of the husband's interest to the claim of a creditor, upon the wife and children.

An administrator is entitled to set off against the share of one of the next of kin in the intestate's estate, the whole of a debt of which part had become barred by the Statute of Limitations.

FURTHER CONSIDERATION. Sarah Cordwell died intestate, and on the 9th of May, 1873, administration of her

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estate and effects was granted to one of her cousins, named Edward Nicholas Cordwell.

Shortly afterwards a suit for the administration of her estate was instituted by summons by John White and Mary Frances his wife, against the administrator—the female plaintiff being another cousin.

Inquiries having been directed by an order of the 11th of July, 1873, the Chief Clerk found the next of kin to be seven in number, of whom the female plaintiff, the defendant, and another cousin, named William Thomas Cordwell, were three.

He also found as follows :

The plaintiff, John White, was indebted to the estate in a balance, the amount of which was in dispute, of a debt, which had been secured by a mortgage, dated the 8th of 645] May, 1868, made by *White to the intestate, to secure repayment of £850 and interest at £5 per cent. He was also indebted to the estate in a sum of £45, in respect of a guarantee which had been given on his behalf by the intestate.

White and his wife, on the 20th of March, 1875, executed a settlement, whereby “all that one equal seventh part or share, or other the parts, share, or interest” of Mary Frances White in the personal estate of the intestate was settled for the benefit of her and her children.

The defendant, the administrator, sought to vary this, contending that White's debt ought to be deducted from Mrs. White's share in the fund, and paid to him, the administrator, and only the residue settled.

White, who was a journeyman carpenter, and who had been injured by an accident, was in the receipt of earnings, not more on an average than 12s. a week, and had to support his wife and a family of six young children.

Another question arose thus: the Chief Clerk found that William Thomas Cordwell was indebted to the estate in a sum of £400, being the balance of principal due on a promissory note dated the 25th of December, 1864, for £500, payable to the intestate by quarterly instalments of £25 each, with interest at £5 per cent., from the 25th of December, 1865, “part of which debt and interest,” the certificate stated, “is barred by the Statute of Limitations.”

The defendant, the administrator, contended that he was at liberty to retain and set off the whole of William Thomas Cordwell's debt, including that part of it which was statute-barred, against his seventh share in the intestate's estate.

Mr. *Little*, Q.C., and Mr. *Edward P. C. Hanson*, for the plaintiff: The wife's equity must prevail over the right of

the administrator to set off a debt of the husband: *Ex parte O'Ferrall*⁽¹⁾; *M'Cormick v. Garnett*⁽²⁾.

Mr. *Frederick Thompson*, for the defendant: As to the wife's equity, in the cases cited, only one moiety of *the wife's legacy was settled on her, and against the [646 other moiety the executor was allowed to set off the husband's debt. That is all we now ask.

It is not the practice of the court to settle the whole of the fund, unless the husband is actually insolvent: *In re Suggett's Trusts*⁽³⁾.

SIR JAMES BACON, V.C.: The question is one of discretion, to be exercised by the court according to the facts of each particular case.

In this instance I think the circumstances of the husband are such as to amount to insolvency, or at least to inability to support his wife and children, within the meaning of the rule, and the whole fund must be settled.

Mr. *Thompson*, in continuation: Upon the other point, the right of an executor to retain a statute-barred debt against a legacy has been long established: *Courtenay v. Williams*⁽⁴⁾.

There is no authority on the precise point of whether an administrator can set off a statute-barred debt against a share of an intestate's estate; but the principle is analogous, and the result must be the same.

Mr. *Kay*, Q.C., and Mr. *Millar*, for William Thomas Cordwell: We do not dispute the administrator's view in the case of a legacy. But the difference is obvious: a legatee takes by the bounty of the testator, whereas next of kin take by operation of law, under a statute.

We admit there is no authority on the point.

Mr. *Hubert Lewis*, for others of the next of kin.

SIR JAMES BACON, V.C.: I am not surprised that there is no authority on the point.

The duty of an administrator is to administer the estate of the intestate. In this instance part of the estate consists of this debt, which is due to the estate, though the remedy for recovering part of it may have become barred by statute. Until the debtor *discharges his duty to the estate by [647 paying the debt which he owes to it, he can have no right or title to any part of it under the statute.

A legacy no doubt is a gift arising from the bounty of the testator, but a legacy can only be paid in the course of administration; that is to say, after all the claims of creditors

(1) 1 Glyn & J., 847.

(2) 2 Sm. & Giff., 37.

(3) Law Rep., 3 Ch., 215.

(4) 3 Hare, 539; 15 L. J. (Ch.), 204.

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of the estate and all the liabilities of debtors to the estate have been satisfied.

I have not the slightest doubt that this person, being one of the next of kin of the intestate, can take no share of the estate until he has discharged his obligation to it, and paid the debt in full.

Solicitor for the plaintiffs: Mr. *Helsham*.

Solicitors for the defendant and W. T. Cordwell: Messrs. *Pritchard & Son*.

Solicitor for other next of kin: Mr. *A. Drew*.

[Law Reports, 20 Equity Cases, 647.]

V.C.B., July 7, 1875.

In re GARDINER'S ESTATE. GARRATT V. WEEKS.

[1874 G. 42.]

Will—Bequest to Brothers and Sisters at Twenty-one or Marriage—Brother in esse, but not born, at Death of Testatrix—Class when ascertained—After-born Brother excluded.

Testatrix by will bequeathed residuary personal estate unto and equally between all her brothers and sisters, share and share alike. She directed that the shares of her brothers respectively should not vest in them respectively until they should respectively attain twenty-one, and that the shares of her sisters should not vest in them respectively until they should respectively attain that age or marry:

Held, that the testatrix's brothers and sisters formed one class only of persons; and that a brother not born, though *en ventre sa mère* when the eldest of the brothers and sisters who attained twenty-one came of age, was excluded; although he was born before the eldest of the brothers only who attained twenty-one came of age.

FURTHER CONSIDERATION. Mary Deborah Gardiner, by her will, dated the 14th of January, 1852, gave a legacy of £10, and then gave and bequeathed all her estate and effects whatsoever and wheresoever as follows:

"Unto and equally between my father James Thomas 648] Gardiner, *my mother Ann Gardiner, and all my brothers and sisters, share and share alike; nevertheless I direct that the shares of my said brothers respectively shall not vest in them respectively until they shall respectively attain the ages of twenty-one years; and the shares of my said sisters shall not vest in them respectively until they shall respectively attain that age or marry."

At the date of testatrix's death she had three living sisters and two brothers. One of her sisters had died an infant.

The first of her brothers and sisters who came of age was a sister who attained twenty-one in April, 1849. At that date all the five brothers and sisters living at her death were born.

Testatrix died on the 15th of January, 1852, and on the

3d of April, 1852, testatrix's mother gave birth to another child, a son, named Thomas Murray Gardiner.

The first of testatrix's brothers who came of age attained twenty-one in December, 1855.

The question was whether Thomas Murray Gardiner was entitled to a share as one of testatrix's brothers.

Mr. *T. A. Roberts*, for the plaintiff in the suit.

Mr. *Aldred W. Rowden*, for the defendant, the executor, and for some of the beneficiaries under the will.

Mr. *Nalder*, for Thomas M. Gardiner: The circumstance that Thomas M. Gardiner was not actually born at the testatrix's death, he being at the time *en ventre sa mère*, does not, of itself, prevent his participating: *Bennett v. Honeywood* (¹); *Baldwin v. Rogers* (²).

Upon the question as to the date when the class becomes ascertained, one of the latest authorities is *Gimblett v. Purton* (³), against which it would be in vain to contend, if the language here was similar. But here there is a direction that the shares of each brother and sister shall not vest until twenty-one or marriage, which leaves the case open to the construction adopted by Vice-Chancellor Parker in *Taylor v. Frobisher* (⁴), that vesting at *twenty-one does not [649 mean indefeasibly vesting, but only vesting subject to becoming divested.

Moreover, here the testatrix has in fact made two separate classes, one of her brothers, and another of her sisters; and Thomas M. Gardiner is admissible into the class of brothers; if not into the class of brothers and sisters taken together: *Whitbread v. St. John* (⁵).

SIR JAMES BACON, V.C.: This point, in my opinion, is covered by the decision in *Gimblett v. Purton* (¹), and by a great many other authorities to which it is unnecessary particularly to refer.

Mr. *Nalder* has endeavored to show that there are two classes of legatees, and that a different condition of membership is attached to one of the classes than is attached to the other; but in my judgment such difference of language as occurs here does not divide the legatees into two classes.

The class of brothers and sisters of the testatrix is a single class, and, being so, immediately upon one of the class attaining twenty-one, there can be no further addition to the class; and, consequently, the child who, in this instance,

(¹) Amb., 708; Sugden on Powers, 8th ed., p. 653.

(²) 3 D. M. & G., 649-656.

15 ENG. REP.

(³) Law Rep., 12 Eq., 427.

(⁴) 5 De G. & Sm., 191.

(⁵) 10 Ves. 152.

was born after the date when the eldest of the brothers and sisters who attained twenty-one came of age, is excluded.

It may be observed that in the head-note to the report of *Gimblett v. Purton* some ambiguity may arise from the use of the word "alive;" since no child except a child "born" when the eldest attained twenty-one can be admitted into the class; and a child born after that date, although *en ventre sa mère*, and so in fact living at or before the date, must be excluded.

The costs of the child, Thomas Murray Gardiner, will nevertheless be allowed.

Solicitor for the plaintiff and defendant: Mr. F. L. Soames, agent for Mr. Thomas Cooke, Wokingham.

Solicitors for other parties: Messrs. Collyer-Bristow, Withers & Russell; Messrs. May, Sykes & Batten.

[Law Reports, 20 Equity Cases, 659.]

V.C.B., July 8, 9, 1875.

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*SHEPHEARD V. WALKER.

[1875 S. 82.]

Specific Performance—Delay—Lessor and Lessee.

At the expiration in July, 1857, of a lease under which by assignment he was in possession of property, B. signed an agreement to accept from A. a new lease for thirty-one years, at the same rent as was reserved by the old lease, and payment of £600 on the day fixed for completion (1st August, 1857), with interest if the lease should not be completed on the day fixed. A draft lease was sent to B. for his approval but was not returned, and no steps were taken by A. to press for completion. B. remained in possession and paid rent, but no payment of the £600 or interest was ever made or demanded. In 1871 A. died. On bill by her legal personal representative:

Held, that as B.'s possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the £600 from the 1st of August, 1857.

In July, 1857, Miss Read agreed, in consideration of £600, to grant to the defendants, Messrs. Walker, a lease of the Coventry Cross public house, at Bromley (then in the occupation of the defendants or their undertenants, under a lease of the 15th of August, 1826, granted by Miss Read's father and predecessor in title to Messrs. Taylor, Walker & Taylor, and vested in the defendants by assignment), for the term of thirty-one years, from the 24th of June, 1857, at the yearly rent of £100 payable quarterly. And it was agreed that the said sum of £600 should be paid by the defendants to Miss Read on the 1st of August, 1857, on which day the lease was to be completed and a counterpart to be

executed by the defendants, and if from any cause whatsoever the lease should not be completed on that day and the sum of £600 paid, the defendants were to pay interest on the same at 5 per cent. from that day till completion. It was also agreed that the lease should contain similar covenants and provisos to those contained in the lease of the 15th of August, 1826. The memorandum of agreement containing these terms was signed by one Blackie, a clerk of the defendants, as agent on their behalf.

Miss Read instructed her solicitor to prepare a draft lease in pursuance of the agreement, and on the 14th of [660 August, 1857, a fair copy of the draft was delivered to the defendants for their approval; but they had never returned the draft to Miss Read, or to any one on her behalf, and, as the bill alleged, from their refusing or neglecting to return the draft and to pay the £600 premium, the lease had never been executed. At the date of the agreement, and ever since, the premises were and had been in the possession and occupation of the defendants, who had from time to time made payments to Miss Read in respect of the yearly rent of £100, and, as the bill averred, for interest upon the said sum of £600; but this averment was not borne out by the receipts produced in evidence. The last of such payments was made on the 20th of March, 1871, £98 6s. 8d., being the amount (less income tax) of one year's rent which accrued due under the agreement on the 25th of March, 1866.

Miss Read died on the 6th of December, 1871, and the plaintiff, as her surviving executor, was her legal personal representative.

Shortly before her death the license for the public house comprised in the demise was forfeited, owing, as the bill alleged, to the wilful misconduct of an under-tenant of the defendants.

The whole of the £600, with a large arrear of interest thereon, and the rent from the 25th of March, 1866, up to the death of Miss Read, was now claimed by the plaintiff, as her legal personal representative, and the bill was filed to obtain specific performance of the agreement and damages for non-fulfilment thereof, and in particular damages in respect of the forfeiture and loss of the license of the public house.

The defendants by their answer stated that although the memorandum of agreement of July, 1857, was signed by their clerk, and the draft of a proposed lease sent to them, the draft was never approved by them, and the whole mat-

ter then dropped and no further action was ever taken therein. They continued to hold the premises at the old rent of £100 per annum, as paid under the expired lease, but for no definite term, and without the payment of any premium. No money was ever paid by way of premium or for interest on the premium, nor was any application ever made to them by or on behalf of Miss Read for premium or interest, or for a return of the draft lease by or on behalf of 661] Miss Read, down to *the day of her death. Under the circumstances, the defendants submitted that the memorandum and negotiations for a lease for thirty-one years in consideration of a premium were waived and abandoned by the acts and conduct of the parties, and that the claim now set up by the bill to compel them to take a lease and pay £1,500, or thereabouts, for the same, was unjustifiable; that Miss Read, if she desired to compel the plaintiffs to pay the suggested premium and take a lease, was bound to have demanded the premium and tendered the lease within a reasonable time, and that she would have been debarred by her own conduct and laches from enforcing any such agreement had she attempted to do so, which she never did. They submitted that they were not liable to pay the £1,552 16s. 6d. alleged to be due under the alleged agreement, or any other sum except the yearly rent of £100, which they had always been, and now were ready and willing to pay to the person legally entitled, so long as their occupation of the premises continued.

From the evidence of the plaintiff, who had been Miss Read's solicitor, it appeared that he had on several occasions called her attention to Messrs. Walker, and that Miss Read told him that she did not wish the defendants to be pressed; that she was not in need of the premium of £600, and that she could not get as much as 5 per cent. interest for it elsewhere, and she considered it safe. Miss Read was also stated to have been possessed of very considerable sums of money in the funds and a large quantity of house property, especially in Stamford Street. She was in the habit of allowing the dividends and rents thereof to accumulate for several years before receiving the same, and at the time of her death four and a half years' dividends at least remained unreceived by her upon her property in the funds, and considerable arrears of rents were due by her various tenants and lessees.

Mr. Jackson, Q.C., and Mr. Wells, for the plaintiff: The defendants, who have continued in possession of property since August, 1857, under an agreement for a lease, subject

to a premium of £600, with interest until execution of the lease, their possession being referable to no other agreement, decline to pay the premium, which was an essential part of the consideration *for the lease, because, for- [662 sooth, they have been in possession so long, and the demand is said to be stale. But although as a general rule delay and laches on the part of the plaintiff are a good defence to a suit for specific performance, the principle does not apply, and this defence cannot be sustained, where the relation of the parties has been in no degree altered by the delay, and the defendants have been in possession under and enjoyed the benefits of the agreement; while the plaintiff and his testatrix have not been sleeping upon their rights, but simply relying on their equitable rights, without thinking it necessary to have their legal rights perfected. In such a case there has been such part performance of the agreement as to render the defence of laches untenable and inequitable: *Clarke v. Moore* (¹); *Sharp v. Milligan* (²).

Mr. *E. Beaumont*, for Chabot, the heir-at-law of Miss Read.

Mr. *Kay*, Q.C., and Mr. *F. V. Hawkins*, for the defendants: The agreement of which specific performance is sought was entered into eighteen years ago and immediately abandoned, and there has been no part performance by the defendants sufficient to get rid of the effect of the delay and waiver. We have remained in possession, not under the agreement of July, 1857, but as tenants at will holding over after the expiration of the old lease, and we have simply paid the old rent thereby reserved. In order to amount to part performance the conduct of the defendants must be unequivocally referable to the agreement: *Morphett v. Jones* (³); *Nunn v. Fabian* (⁴). The mere fact of continuance in possession after the expiration of the old lease does not amount to part performance of an agreement to accept a new lease: *Wills v. Stradling* (⁵). It was of the essence of the agreement that interest should be paid on the premium if the premium remained unpaid, but for eighteen years the defendants have been allowed to remain on the footing of the old lease without payment of the premium or any interest thereon, and *without any claim for it [663 having been either made or recognized; and upon the evidence afforded by the receipts and the conduct of the parties the agreement was clearly treated as abandoned, at all

(¹) 1 J. & Lat., 723.

(²) 22 Beav., 606.

(³) 1 Sw., 172.

(⁴) Law Rep., 1 Ch., 35.

(⁵) 3 Ves., 378.

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events *quâ* payment of premium. A plaintiff cannot call upon a court of equity for a specific performance unless he has shown himself ready, desirous, prompt, and eager: *Milward v. Earl Thanet* ⁽¹⁾; *Eads v. Williams* ⁽²⁾; and the delay of eighteen years is fatal to the plaintiff's claim: *Lehmann v. McArthur* ⁽³⁾; *Southcomb v. Bishop of Exeter* ⁽⁴⁾; unless in a case where nothing remains to be done but to clothe the equitable estate with a legal title: *Crofton v. Ormsby* ⁽⁵⁾. In any case, even if the rest of the contract could be enforced, payment of the £600 premium and interest is barred by the Statute of Limitations.

Mr. Jackson, in reply.

SIR JAMES BACON, V.C.: The case as stated upon the bill is as plain a case as possible. A lease in which neither the testatrix nor the defendants were lessor or lessees had been in existence, and is recited in the agreement entered into between the testatrix and the defendants. That agreement is for a lease upon terms clearly specified, and it is admitted by the defendants in unqualified terms that that agreement was signed by their agent on their behalf. The notion that the possession which has been continued by the defendants is to be referred to the old lease, or to a tenancy at will after the old lease had expired, is, in my opinion, wholly without foundation, and is contradicted by the plain facts of the case, and is not even asserted by the defendants in their answer. [His honor, after stating the agreement, continued:] As I have said, nothing can be more explicit than the terms of that agreement, nothing more distinct than that any possession to be taken or retained by the defendants after that can be referred only to that agreement. The cases which have been referred to were cases in which it was endeavored to supply the deficiency occasioned by 664] *the strict interpretation of the statute—the deficiency of a written contract. But the contract being admitted, the difficulty that arose in *Morphett v. Jones* ⁽⁶⁾ was at once got over.

It only remains to consider the terms on which the tenancy has been continued. It is said that the rent is just the same as it was under the old lease. That may be, but it is the only rent which Miss Read claimed to be entitled to under the agreement, and that the defendants say in their answers they have paid to her from the time mentioned in the answer up to the date there specified. There is no

⁽¹⁾ 5 Ves., 720, n.

⁽²⁾ 4 D. M. & G., 674.

⁽³⁾ Law Rep., 3 Ch., 496.

⁽⁴⁾ 6 Hare, 213.

⁽⁵⁾ 2 Sch. & Lef., 583, 603.

⁽⁶⁾ 1 Sw., 172.

doubt, upon the admission in their own answer, that from the time of the execution of the agreement by their agent on their behalf they did pay the said rent (that is the rent mentioned in the agreement) to Miss Read in her lifetime. What becomes then of the objection that this may be referred to something else; that the possession might have been a continuance as tenants from year to year? They admit they have been paid the very rent which by the agreement they had stipulated to pay.

It is said that the plaintiff is deprived of the right which he otherwise possessed by reason of laches. Now the laches consists in this. The testatrix may be said to have been an eccentric person, but with that I have nothing to do, and I do not regard it in considering the case. But the defence set up by the answer is, after admitting the agreement, after admitting that the draft of the proposed lease was sent by the solicitor of Miss Read—"but the draft was never approved of by us, and the whole matter then dropped," and—adopting the favorite Americanism—"no further action was ever taken herein." Then comes, not the assertion of a fact, but an expression of belief. "Under the circumstances aforesaid we submit and humbly insist that the aforesaid memorandum and negotiations for a lease for thirty-one years in consideration of a premium were waived and abandoned by the acts and conduct of the parties."

There is not a particle of evidence that the agreement between these parties was waived and abandoned. To do the defendants justice, they have carefully, at all events effectually, avoided pledging their oaths to any such statement. The evidence on the other side is complete and perfect that it never was abandoned. Under *these cir- [665 cumstances I am asked to pause before making a decree for the specific performance of this agreement, against which there is not a particle of defence, not a single fact proved, not a single statement or suggestion made to which I can in the slightest degree attend. Something was said about the Statute of Limitations, but it has no more to do with the case than many other of the topics to be read in the answer. The stipulation in the agreement is that when the lease shall be completed the £600 shall be paid. The lease has never been completed, and no statute exists to bar the claim. In my opinion a plainer case never was presented to the court, and the plaintiff is entitled to the decree he asks for, as the representative of Miss Read, for specific performance of this agreement, and to have the £600 paid as part of the consideration. There can be no inquiry into title, for that is

prevented by the agreement. The lease to be settled in Chambers if the parties differ.

Mr. Kay: Your honor does not mean to give interest on this money.

The VICE-CHANCELLOR: Indeed I do.

Mr. Kay: Not for eighteen years?

The VICE-CHANCELLOR: Yes; because you have so stipulated in plain terms. You have contracted that you will pay interest until the treaty shall be completed, and it is nobody's fault but the defendants' that it has not been completed.

Solicitors: Messrs. *Sheppard & Sons*; Messrs. *Gellatly, Son & Warton*.

[Law Reports, 20 Equity Cases, 666.]

V.C.B., July 18, 1875.

666]

*SMITH V. ILIFFE.

[1874 S. 813.]

Ward of Court—Settlement of Personal Estate—Limitation on Death of Husband and in default of Children to Next of Kin of surviving Wife—Rectification by giving the property to Wife absolutely.

By a marriage settlement executed in pursuance of articles made under the order of the court on the marriage of a lady, an infant and a ward of court, personalty of the wife was limited on death of the husband and in default of children, both which events happened, to the wife, as she should by will appoint, and in default to her next of kin.

Upon her uncontradicted evidence that this was not in accordance with her intention:

Held, that she was entitled to have the settlement rectified by limiting the property, in the events which had happened to herself, her executors and administrators, absolutely; and declaration to that effect ordered to be indorsed on the settlement.

MOTION for decree. By articles dated the 10th of December, 1833, and made prior to the marriage of Elizabeth Harrold, a minor and ward of court, with William Palmer, in pursuance of an order of the court, dated the 3d of December, 1833, certain personal property of Miss Harrold was covenanted to be settled upon trusts therein mentioned; and it was by the articles declared that if there should be no child of the the marriage, then, after the decease of the survivor of William Palmer and Elizabeth Harrold, the trustees should be possessed of the trust fund and the income thereof upon such trusts as Elizabeth Harrold, whether covert or sole, should by will appoint, and in default of such appointment for the next of kin of Elizabeth Harrold.

The marriage took place on the 12th of December, 1833.

On the 9th of December, 1834, Elizabeth Harrold attained twenty-one.

By the marriage settlement, which was dated the 4th of February, 1836, and made in conformity with the articles, and in pursuance of another order of court, dated the 30th of June, 1835, the above personalty was settled upon the trusts therein mentioned; and the settlement continued:

"In case there shall be no child of the said William Palmer by *the said Elizabeth Harrold who under the [667 trusts hereinbefore declared shall attain a vested interest in the said sum, then in such case the said trustees shall, after the decease of the survivor of them, the said W. Palmer and Elizabeth Harrold, stand and be possessed of and interested in the said sum, and the dividends or annual produce thereof, upon and for such trusts, intents, and purposes as the said Elizabeth Harrold, whether covert or sole, shall by her last will and testament in writing, or by any codicil or codicils thereto to be signed and published by her in the presence of two or more credible witnesses, direct or appoint, and in default of such appointment, upon trust for all and every such person or persons as at the decease of the survivor of them, the said W. Palmer and Elizabeth Harrold his wife, shall be the next of kin of her the said Elizabeth Harrold."

On the 14th of October, 1868, William Palmer died. There never was any issue of the marriage.

On the 23d of April, 1871, Elizabeth Palmer, the widow, married the Rev. John Henry Smith; and on the 20th of November, 1874, she filed this bill against John Iliffe, the surviving trustee of the settlement, and her husband, J. H. Smith, praying for a declaration that she was entitled to have the articles and settlement rectified in such manner and form as that, in the events which had happened, the funds now subject to the settlement might be held by the defendant, John Iliffe, in trust for the plaintiff, her executors, administrators and assigns, absolutely, and as part of her separate estate.

Mrs. Smith, by her affidavit in support of the bill, said that the terms of the settlement were arranged by her mother and her advisers without reference to herself; that she was then a girl under twenty-one, but that she never understood that she was to be deprived of the control of her own property in the event of her becoming a widow and childless. She also said that as far as she was aware she had no near relations, and she did not know who was her next of kin.

Mr. Kay, Q.C., and Mr. Warmington, for the plaintiff: The proper frame of a settlement by the court with regard 668] *to this particular limitation is given in *Carter v. Taggart* ('); Seton (').

As to the power of the court to rectify the settlement, the authorities are, *Hobson v. Ferraby* ('); *Wolterbeek v. Barrow* ('); *Harbidge v. Wogan* ('); *Torre v. Torre* (').

In *In re Best's Settlement Trusts* (') it was held that by the "personal representatives" of the wife in a limitation of this kind, are meant, not her next of kin, but her executors and administrators.

Mr. Townsend, for the surviving trustee of the settlement.

Mr. Field, for the second husband.

SIR JAMES BACON, V.C.: The last case which has been cited furnishes at least an intelligible and satisfactory ground on which matters of this kind may be disposed of. In *In re Best's Settlement Trusts* (') Vice-Chancellor Hall observes that nothing can be more improbable than that a lady, in making a settlement of her own property, should intend to put it beyond her own control in the events of the husband dying and there being no child of the marriage, and thus deprive herself of the power of making any provision on the occasion of a second marriage.

These observations have a direct bearing on the present case; and authority is not wanting, if it were needed, to show that the court has power to act in the way which is prayed by this bill.

The case before the late Master of the Rolls of *Wolterbeek v. Barrow* ('), though it proceeded on facts which are not present here, is an authority as to the jurisdiction of the court.

In the present case the wife states positively that it was not her intention that she should be deprived of the control of her property in the events which have happened; and against that statement there is not a particle of evidence. 669] Such a state of things *as this must, according to the practice of the court, have great weight; and there is abundant ground for holding that the plaintiff is entitled to have the settlement rectified in such a way as that, in the events which have happened, the property may be hers absolutely.

(') 5 De G. & Sm., 49; 1 D. M. & G., 286.

(*) Page 666.

(*) 2 Coll., 412.

(*) 23 Beav., 423.

(*) 5 Hare, 258.

(*) 1 Sm. & Giff., 518.

(*) Law Rep., 18 Eq., 686, 691.

(*) Ibid., 686, 692.

There will be a declaration in the terms of the prayer of the bill, and it will be sufficient that that declaration be indorsed on the settlement.

The costs of all parties, as between solicitor and client, will come out of the fund.

Solicitors: Messrs. *Field, Roscoe & Co.*; Messrs. *Iliffe, Russell & Iliffe*.

[Law Reports, 20 Equity Cases, 669.]

V.C.B., July 29, 1875.

CANNON V. TRASK.

[1875 C. 242.]

Injunction—Powers of Directors—Annual General Meeting—Voting Powers of Shareholders.

Although the court will not interfere with the powers and duties of directors in their management of the internal affairs of a company, directors will be restrained from fixing a particular date for holding the annual general meeting of the company for the purpose of preventing shareholders from exercising their voting powers.

THIS was a motion for an injunction to restrain the defendants, the chairman and directors of Elworthy Brothers & Co., Limited, from holding the annual general meeting of the defendant company on the 3d of August, 1875, and from summoning any meeting of the defendant company on or before the 13th of August, 1875.

The company was formed in March, 1866, for the purpose of purchasing and extending the business of Messrs. William and Henry Elworthy, woollen manufacturers, of Wellington, Somerset, with a nominal capital of £200,000, divided into 10,000 £20 shares, the first issue consisting of 5,000 shares, of which 2,500 were to be issued to the public. Messrs. Elworthy agreed to act as managers of the company for a period of ten years from the 1st of March, *1866, at a salary of £500 a year each, with an increase [670 contingent upon the amount of dividend declared.

Messrs. Elworthy continued to act as managers of the company, but recently, and especially since August, 1874, differences had arisen between themselves and the defendants, the other directors, including the defendant Trask, the chairman, with regard to the management of the company, from which, as it was alleged, the defendant directors were endeavoring to exclude Messrs. Elworthy. Under these circumstances the company became divided into two rival camps, one represented by Messrs. Elworthy and their

friends, including the plaintiffs, the other by the defendants, the directors and chairman. But although they held a majority of the shares, Messrs. Elworthy were not, in consequence of the mode in which the shares were distributed, able to exercise a voting power proportioned to the shares held by themselves and their adherents in the company, nor, being in a minority on the board, successfully to oppose the action of the defendants.

In the course of the contest the practice of buying up and distributing shares for the purpose of obtaining an increase of voting power and strengthening their interest, which was alleged to have been commenced by the directors, had been largely resorted to on both sides during the present year. In May, 1875, Messrs. Elworthy executed transfers of a large number of shares to nominees. Again, on the 30th of June, 1875, the transfers of 447 shares to various nominees of the defendants were registered, and in the course of the following month transfers of 935 shares were made to nominees of the plaintiffs and the friends of William and Henry Elworthy. In consequence of these transfers the plaintiffs' party stood on the 13th of July the registered holders of 3,068 shares, representing 1,905 votes—a majority of votes and a majority of the shares in the company; but from the transfers of several of these shares not having been approved and registered until the 13th of July, the plaintiffs would not, having regard to article 65, command a majority of votes at any meeting held before the 13th of August, 1875.

On the 19th of July a resolution was passed by the board of directors, and notice was sent out to the shareholders convening the annual general meeting for the 3d of August, 671] without waiting *for the preparation and sending out of the balance-sheet and completion of the audit. The bill charged: In fixing the annual meeting at the unusually early date of the 3d of August, the directors were actuated by the improper motive of preventing William and Henry Elworthy and their friends from exercising the full voting power which they would possess if the meeting were held, as had always heretofore been the case, on the third or fourth Monday in August, and there was no reason why the meeting should be summoned for so early a date except that of securing to the defendants a majority of votes with the object of furthering the views of themselves and their friends. Under these circumstances the bill was filed by the plaintiffs, the registered holders of 397 shares (on behalf of themselves and all other the shareholders other than the

defendants), with the consent and approval of registered holders of 3,065 shares entitled to 1,905 votes (assuming the meeting to be held at the usual time), for the purpose of restraining the holding of the annual general meeting on the 3d of August, and from summoning any meeting on or before the 13th of August.

The bill also sought to restrain the directors from issuing preference shares, and from doing certain other acts, but as the argument and the decision were confined to the question of the validity of the course taken by the directors in summoning the meeting for the 3d of August, 1875, any detailed statement of the other points raised by the bill is unnecessary.

The clauses of the articles of association material for this report are the following :

By article 5 it was provided that the company might in general meeting from time to time, by special resolution, alter and make new provisions instead of or in addition to any regulations of the company.

"6. Shares shall from time to time be issued by the directors, either as one class or as several classes, at such times and in such manner as the board shall think fit. The board shall also have power to attach to the shares comprised in the several classes any special priority or position with reference to preferential, guaranteed, fixed, fluctuating, redeemable or other dividends or interest, or any other special priority, condition, or restriction."

*"21. Subject to the restrictions of these presents, [672 any member may sell or transfer all or any of his shares by authority in writing in the form hereinafter prescribed, or to the like effect."

"27. No share shall be transferred until all calls upon such share be fully paid up. The company may decline to register any transfer of shares made by a member who is indebted to them, or if the directors shall be of opinion that the transferee is an irresponsible person, but such last-mentioned ground of objection shall not apply after the full amount of the shares transferred shall have been paid up."

"42. With the sanction of a special resolution of the company previously given in general meeting, the directors may increase its capital by the issue of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts as the company in general meeting shall direct, or if no direction be given, as

the directors think expedient, whether the whole of the shares shall have been fully paid up, and whether the whole of the shares then for the time being issuable shall have been issued or not."

"43. With the sanction of a special resolution, the directors may attach to such or any of such new shares any preference or guaranteed dividend or profits, or any preference or priority as regarded the capital or the dividends or profits, or both, over the shares in the then existing capital, or such other special rights, privileges, priorities, or advantages as they think fit."

"Meetings.

"46. The first general meeting shall be held at such time, not being more than twelve months after the registration of the company, and at such places as the directors may determine.

"47. Subsequent general meetings shall be held at such time and place (provided the same be held once at least every year) as may be prescribed by the company in general meeting, and if no other time or place be prescribed, a general meeting shall be held yearly in the month of August in every year, or on such day and at such hour and place as shall from time to time be determined by the directors."

"49. The directors may whenever they think fit, and they shall upon a requisition made in writing and signed by not 673] less than one-fifth in number of the members in the company, or by any number of members holding in the aggregate not less than one-fifth of the nominal capital of the company, convene an extraordinary general meeting.

"50. Any requisition so made by the members shall express the object of the meeting proposed to be called, and shall be left at the office of the company.

"51. Upon the receipt of such requisition, the directors shall forthwith proceed to convene an extraordinary general meeting; and if they neglect to do so for twenty-one days from the time of requisition being so left, the requisitionists, or any other members amounting to the required number or value, may themselves convene the meeting and give the necessary notices for the purpose."

52-53. Seven days' notice at least, specifying the place, day, and hour of meeting, and (in case of special business) the general matters of such business, to be sent to every member and signed by the secretary, except in the case of a meeting convened by members.

With respect to the votes of members, it was provided :

"65. Every member who shall have been duly registered for one month previous to meeting shall be entitled to vote at such meeting, and shall have for every share held by him up to twenty, one vote ; for every additional five shares held by him beyond the first twenty up to 100, one further vote ; and for every additional ten shares held by him beyond the first 100, one further vote.

"66. The chairman of every meeting shall have a casting vote in addition to the vote to which he shall be entitled as a member."

"69. No member shall be entitled to attend or vote at any meeting while any calls or interest due from him, alone or jointly with any person or persons, are or is in arrear.

"70. Votes may be given either personally or by proxy, but every proxy shall be appointed in writing under the hand of the appointer, if a corporation under their common seal.

"71. No person shall be appointed a proxy who is not a member and entitled to vote. The instrument appointing a proxy shall be deposited at the office at least forty-eight hours before the time fixed for holding the meeting at which he proposes to vote, and *no instrument appointing a [674 proxy shall be valid after the expiration of one calendar month from the date of its execution."

Mr. *Kay*, Q.C., and Mr. *F. Thompson*, in support of the motion : Although the court will not in general interfere in the internal management of the affairs of a company, directors will be restrained from an inequitable use of their legal powers for the purpose of controlling the free legitimate action of the shareholders : *Fraser v. Whalley* (').

This is no mere question of internal management. It is not denied by the defendants that they have appointed the annual meeting for the 3d of August, a period much earlier than usual, for the purpose of defeating the legitimately created votes of the plaintiffs and their nominees, which represent the majority of shares and the largest number of votes, but do not become available until the 13th of August for voting purposes. The plaintiffs, therefore, are entitled to restrain the defendants from the exercise of their powers in such a way as to deprive the plaintiffs of their voice in the affairs of the company.

Mr. *Hastings*, Q.C., and Mr. *E. Cutler*, for the defendants, the chairman and directors other than William and

(') 2 H. & M., 10.

Henry Elworthy: The court will not interfere between members of a company for the purpose of enforcing duties arising out of matters properly the subject of internal regulation: *Lindley on Partnership* (1). It will not compel shareholders, to whom the right of removing these directors has been given by the deed, to justify the grounds on which their discretion has been exercised: *Inderwick v. Snell* (2); and in the case of directors there is no jurisdiction to take the management of the company out of their hands by compelling them to summon, or restraining them from holding, a general meeting for any purpose connected with the management of the company: *MacDougall v. Gardiner* (3), unless it can be shown that such powers or discretion are being fraudulently exercised.

By the articles it is left to the discretion of the directors to fix the day, hour, and place of the annual general meeting which is *to be held in the month of August. Ample notice of the meeting summoned for the 3d of August has been given, and any intention to exercise their powers otherwise than for the general benefit of the company, in strict conformity with the law and the provisions of the articles, is distinctly denied by the defendants. The 3d of August has been fixed as the period best suited to the wishes and convenience of the majority (who have objected to the lateness in the month at which the meeting has heretofore been held), and as the accounts and balance-sheet are ready and completed, and were in the hands of the shareholders on the 24th of July, there is no valid reason for postponing the meeting.

SIR JAMES BACON, V.C.: With regard to the defence of this case, no doubt there is a certain ingenuity about it; but in the argument and affidavit the entire point is altogether missed and left in utter silence. The law enables holders of shares to subdivide those shares in such way as they think fit for the purpose of increasing the votes at a meeting. The plaintiffs would willingly exercise that power; that they possess it, is not disputed. The defendants resort to a contrivance for the purpose of preventing their exercising that lawful power. That is the complaint in the bill, and there is not one word in the affidavits that at all touches that point, nor has there been one word addressed to it in the argument on behalf of the defendants. What has been urged is the predominant power of the directors to act for the benefit of

(1) Page 935.

(2) Law Rep., 10 Ch., 606.

(3) 2 Mac. & G., 216.

the company, and that the court will not interfere with the internal arrangements of a company. The case of *Inderwick v. Snell* ⁽¹⁾, and other cases, may be referred to to establish that which nobody ever thought of disputing, and which is not the question in this cause. The question is, whether the directors, who do not in their affidavit disavow their intention of holding this meeting in order to prevent the plaintiffs from exercising their legal right, can be permitted to do so? That is the single question. They have appointed a day for the meeting, which under art. 47 they are entitled to do, but they have done it at such a time and in such a manner as makes it *impossible for the [676 plaintiffs to have their votes recorded. The directors do not deny that in the slightest degree. They say, in making their excuse, that they have been in the habit of calling this meeting as soon as the accounts of the company were prepared and ready to be submitted to the meeting. No doubt it is for the direct advantage of the shareholders to know by the exhibition of the report and the balance-sheet in what circumstances the company stand, so that they may best exercise their right of voting. The affidavit then states that the annual general meeting has never hitherto been summoned before the accounts and balance-sheet and the reports of the directors have been sent to the shareholders. In every case in which the annual meeting has been summoned the annual reports, accounts, and balance-sheet have been sent to the shareholders, together with the notice summoning such meeting. In the present instance the notice was sent on Monday, the 19th of July, and the report and balance-sheet were not sent until the 24th of July. This I take to be unopposed, because, although I entirely concur in all that has been argued, and which is indisputable, as to the powers of the directors, the articles of association, and the general law of the subject, not one word has been said upon the only point on which the plaintiffs rely, and which, as it is uncontradicted, entitles the plaintiffs to the relief asked for by their motion.

Then it was said that the bill was demurrable. Why was it not demurred to? It would be a very fair question to try on demurrer; but if they admitted by demurrer the facts which the plaintiffs allege in their bill, it is not for me to say what would have been the fate of the demurrer, although I can easily foresee it. I think the plaintiffs are entitled to the injunction they ask for to prevent the meeting being held until after the 14th of August. There is no interfer-

(1) 2 Mac. & G., 216.

ence by this order which I make with the powers and duties of the directors.

An appeal from this order was, on the 31st of July, 1875, withdrawn on payment of the costs of all parties by the company.

Solicitors: Messrs. *Simpson & Cullingford*; Messrs. *Vallance & Vallance*, agents for Messrs. *Murly & Sons*, *Bristol*.

[Law Reports, 20 Equity Cases, 692.]

V.C.H., June 30, 1875.

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*MILLS V. CAPEL.

[1875 M. 124.]

Statute of Limitations (3 & 4 Will. 4, c. 27), s. 23—*Tenant in Tail—Defective Assurance—Subsisting Life Estates—Possession.*

Lands limited in equity to T., F., and F.'s wife E. successively for life, with remainder to the first and other sons of F. and E. successively in tail male, with remainder to F. in tail general, with remainders over, were in the year 1835, without the consent of T., the protector of the settlement, by deed inrolled, reciting, contrary to the fact, the seisin in fee simple of F., conveyed by F., E. joining to transfer or bar her dower, to a purchaser in fee simple; and the purchaser then entered into possession. T. died in 1848, F. died without issue in 1859, and E. died in 1873:

Held, that until 1873 the possession of the purchaser was a possession by virtue of the subsisting life estates, and not of the estate tail in remainder of F., and, consequently, was not a possession the continuance of which for the period of twenty years would, under the 23d section of the Statute of Limitations, bar the remainders over.

DEMURRER. The material allegations of the bill were shortly as follows: By an indenture dated the 28th of May, 1802, freehold lands in the parish of Chipstable, in the county of Somerset, were limited in the usual manner to such uses as Francis Mead the elder and Thomasin his wife should jointly appoint, and in default to the use of Francis Mead the elder for life, with remainder to the use of Thomasin Mead for life, with remainder to the use of such child or children of Francis Mead the elder and Thomasin Mead as the survivor of them should by deed or will appoint, and in default of such appointment to the use of Francis Mead the younger in tail general, with remainder to the use of Edward Mead in tail general with remainders over.

693] *By an indenture dated the 25th of November, 1814, and made between Francis Mead the elder and Thomasin his wife of the first part, Francis Mead the younger of the second part, Elizabeth, afterwards the wife of Francis Mead the younger, of the third part, and George Peppin of the fourth part, in consideration of a marriage then intended

and afterwards solemnized between Francis Mead the younger and Elizabeth Mead, and in order to make some provision for them and for the issue of the marriage, Francis Mead the elder and Thomasin Mead, in exercise of their power appointed all the premises comprised in the settlement of 1802, unto George Peppin, his heirs and assigns, to hold the same after the solemnization of the marriage to the use of Francis Mead the elder for life, with remainder to the use of Thomasin Mead for life, with remainder to the use of Francis Mead the younger for life, with remainder to the use of Elizabeth Mead for life or widowhood, with remainder to the use of the first and other sons of Francis Mead the younger and Elizabeth Mead successively in tail male; and in default of such male issue living at the death of the survivor of Francis Mead the younger and Elizabeth Mead, then to the same uses, upon such trusts, and for such intents and purposes, as were declared concerning the same in the indenture of 1802, or such of them as should then be subsisting and capable of taking effect.

Francis Mead the elder died in the year 1828.

At the dates of the indentures of May, 1802, and November, 1814, the owners and occupiers of the settled lands were entitled to certain rights of common over waste lands, parcel of the manor of Chipstable, of which John Stone was lord.

In the year 1834 the Chipstable Inclosure Act was passed for the purpose of allotting and inclosing the waste lands of the manor, which act provided amongst other things that in case any person entitled to an allotment should sell his interest in the waste lands before the award the commissioner should make the allotment to the purchaser.

In anticipation of the award making an allotment in respect of the settled lands, by an indenture (made without the consent of Thomasin Mead, then the protector of the settlement) dated the 31st of January, 1835, and duly acknowledged and inrolled, after *reciting the Chip- [694 stable Inclosure Act, and (contrary to the fact) that Francis Mead the younger was seised in fee simple of the settled lands, and after reciting that Francis Mead the younger had agreed with John Stone for the sale to him of all his right in the said waste lands, and that Elizabeth Mead his wife had agreed to join in the conveyance for the purpose of barring or transferring her dower, Francis Mead and Elizabeth his wife conveyed to John Stone in fee simple all the right and interest of them the said Francis Mead the younger and Elizabeth his wife in the waste lands in the parish of

Chipstable, and in every allotment which might be made in respect of the settled lands.

The award under the Inclosure Act was made on the 19th of May, 1837, and the commissioner awarded and allotted to John Stone, as the purchaser thereof, the waste lands awarded in respect of the settled lands, and he allotted at the same time other waste lands to John Stone, without specifying the particular portion allotted in respect of the purchase from Francis Mead the younger.

John Stone immediately entered upon the waste lands so allotted to him, and either he or the defendant, who afterwards purchased them from him, had been in possession of them ever since.

Thomasin Mead died in July, 1848, without having made any further appointment of the settled lands, and without having done any act to confirm the conveyance of the 31st of January, 1835.

Francis Mead the younger died in May, 1859, without issue, and without having, after the death of Thomasin Mead, done any act to confirm the title of John Stone or the defendant.

Elizabeth Mead, the surviving tenant for life, died June, 1873.

The present bill was filed by James Mills, who derived his title under a proper disentailing assurance executed by the issue in tail of Edward Mead. And after averments to the foregoing effect, the plaintiff stated that he was unable to commence an action of ejectment to recover possession of the settled lands, because George Peppin, in whom the legal estate in the settled lands was vested, had died many years ago intestate, and the plaintiff could not ascertain in whom the legal estate was now vested; and, moreover, because the boundaries of the allotments had been confused, and he was unable to ascertain, without discovery from the defendant, the exact proportion which the settled lands bore to 695] the *other tenements in respect of which allotments were made to John Stone. The plaintiff then submitted that he was tenant in common with the defendant in the lands allotted to John Stone in certain undivided shares, to be ascertained with reference to the quantity and value of the settled lands compared with the quantity and value of the other tenements in respect of which the allotment to John Stone was made, and he prayed by his bill that the defendant might make discovery where the allotted lands were situate, what were the boundaries thereof, and what portion (if any) of the allotment was made in respect of the

settled lands, or if it should appear that no specific allotment was made in respect of them, that the defendant might discover the acreage and value of the whole of the tenements in respect of which the allotment was made, and the proportion which the settled estates bore thereto, and in that case that the plaintiff might be declared to be tenant in common of the allotted lands with the defendant in undivided shares, to be ascertained with reference to the proportion which the quantity and value of the settled estate bore to that of the other tenements in respect of which the allotment was made, and that a partition might be made accordingly; and also for an account of the rents and profits since the death of Elizabeth Mead, and for payment to the plaintiff of his proportion thereof.

To this bill the defendant demurred.

Mr. *W. Pearson*, Q.C., and Mr. *Spencer Vincent*, for the defendant, in support of the demurrer: Possession has continued under the assurance of 1835 from its date until now. Thomasin Mead, the protector of the settlement, died in 1848, and more than twenty years has elapsed since that time, which was the time at which, following the language of the 23d section of the Statute of Limitations (3 & 4 Will. 4, c. 27), "such assurance, if it had then been executed" by Francis Mead the younger, "would, without the consent of any other person," have barred the remainder over.

It is true that Elizabeth Mead lived until 1873, and assuming her life estate not to have been merged by the conveyance of 1835, the remainderman could not sooner have entered; but that is immaterial. This section does [696 not regard the time when the remainderman can first enter. Suppose a base fee immediately expectant on the death of the protector to have been well created, the remainderman could not have entered, although neither could the issue; and all would have been barred at the end of twenty years after the protector's death without having had a chance of preventing the time running. The act, in fact, shifts the assurance to the year 1848. Time has accordingly run against the plaintiff, the right of the defendant is absolute, and the demurrer will lie.

Mr. *Davey*, Q.C., and Mr. *Crossley*, in support of the bill: The possession under the 23d section of the Statute of Limitations must be possession by virtue of the estate tail. Possession under the assurance of the tenant in tail *quâ* tenant in tail did not commence until the death of Elizabeth, in 1873. Although there was only one deed (that of 1835), that deed operated as three, or at least, as two

assurances; first, of Elizabeth's life estate; secondly, of Francis Mead's estate in tail. Her estate was not merged in his notwithstanding the joint conveyance, the contingent remainder to the issue preventing any merger. There has, therefore, been no such possession as will bar the remainder, by virtue of which the plaintiff claims, but only a possession under an assurance by a tenant for life, which is not sufficient: *Morgan v. Morgan* (*).

Mr. Vincent, in reply: There is no ground in sect. 23 for holding that the possession which is to operate as a bar must be carved out of, or be in virtue of the estate tail. A mere secret conveyance, followed by no change of possession, would be insufficient; but the section is satisfied if there be an assurance of such a kind, made by a person so qualified as to pass a base fee, and possession be taken by the grantee "at the time of the execution of such assurance, or at any time afterwards." And this is made clearer by what follows: "And the same person or any other person whatsoever (other than some person entitled to such possession in respect of an estate" in *remainder) "shall continue to be in such possession," &c. Here "possession" must mean the same in both clauses, and in the parenthesis "such possession" cannot possibly mean possession by virtue of the estate tail.

SIR CHARLES HALL, V.C.: This demurrer must be overruled. In my opinion the 23d section of the Statute of Limitations does not apply, for the reasons given by Mr. Davey in his argument, and upon the authority of *Morgan v. Morgan* (*). Moreover, I observe it stated in Sugden's Real Property Statutes (*) that one of the propositions of the Real Property Commissioners was that on any alienation by a tenant in tail by any assurance not operating as a complete bar to the estate tail, and all estates, rights, and interests limited to take effect on the determination or in derogation of it, possession under such assurance should have the same effect in barring the estate tail, and all estates, rights, and interests so limited, as if such possession had been adverse to the estate tail, or to such estates, rights, and interests. And in commenting upon this proposition Lord St. Leonards says: "These intentions were carried into effect by the enactment in the 23d section before quoted, which requires a possession or receipt for twenty years next after the commencement of the time at which such assurance, if it had then been executed by the tenant in tail or the

(*) Law Rep., 10 Eq., 99, 104.

(*) Law Rep., 10 Eq., 99.

(*) 2d ed., p. 86.

person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, at the end of which twenty years such assurance is made effectual against any claimant after or in defeasance of such estate tail. The assurance referred to is the one made by the tenant in tail. The operation of the clause, therefore, is not strictly to make time a bar, but to make time give a full operation to the assurance executed by the tenant in tail."

It was intended to legislate for the case of possession under a base fee; now in this case there was not until 1873 any possession under a base fee, the possession previous to that year having *been by virtue of the life estates of [698 Francis Mead the younger, and Elizabeth his wife. The fact that the same deed which passed those life interests also passed a base fee does not affect the character of the possession held by the purchaser. The "possession" "by virtue of such assurance," to be effectual under the 23d section, must be a possession by virtue of an assurance which turned an estate tail into a base fee. Were this not so, remainders over might be barred by possession under a tenant for life. This demurrer must accordingly be overruled.

Solicitors for the plaintiff: Messrs. *Syms & Son.*

Solicitors for the defendants: Messrs. *Shepherd & Sons.*

The statute of limitations does not run against remaindermen or reversioners, during the continuance of the prior estate. It is aimed at those who may be guilty of laches in omitting to enter, or bring actions, which cannot be said of remaindermen or reversioners, who have no right in law to do either: *Jackson v. Johnson*, 5 Cowen, 74; *Fogal v. Piere*, 17 Abb. Prac., 113; *Clark v. Hughes*, 13 Barb., 147; *Learned v. Tallmadge*, 26 Barb., 448; *Vandervoort v. Gould*, 36 N. Y., 639; *Randall v. Raab*, 2 Abb. Pr., 307; *Moore v. Erwin*, 4 Wend., 58; *Tyler on Ejectment*, 117-8.

In ejectment the plaintiff claimed as heir at law of his mother T., a daughter of H. H. died in 1839 having devised the land to his widow, A., during widowhood, and then to be equally divided among his children. She married again in 1843. T. married the plaintiff's father in 1842, being then eighteen, and they lived with her

mother, he working the land until 1844. T. died about 1848. About 1868, the plaintiff's father surrendered his interest to the plaintiff, who was born in December, 1847. Defendants claimed title to the land by length of possession. Held, that the estate of the plaintiff's father in right of his wife being one for which the father could have maintained an action when they left the land in 1844, the plaintiff was barred, at all events during the life of his father. *Scumble*, that on the father's death he would still be barred, though he had never been in a position to sue: *Trickey v. Seeley*, 31 U. C. Q. B., 214.

It is undoubtedly true that the plaintiff was not entitled to recover during his father's life, for until his death he claimed not under his own estate, as heir, but under his father's estate as tenant by the curtesy.

There is, however, we think, no doubt that after his father's death he could recover on his own title as rever-

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sioner, and the statute would not commence to run against him till his father's death.

oust his co-tenant and thus set the statute to running in his favor as against his co-tenant: *Clapp v. Bromaghim*, 9 Cowen, 530.

Though one tenant in common may

[Law Reports, 20 Equity Cases, 698.]

V.C.H., June 30; July 1, 3, 1875.

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[1873 F. 33.]

Family Settlement—Setting aside—Consideration—Release of Charge—Mistake.

A family settlement will not be supported if founded on a mistake of either party to which the other party is accessory, although such mistake may have been innocently made.

A son, tenant in tail in remainder, shortly after attaining twenty-one joined with his father, the tenant for life, in re-settling the family estates. The son was influenced to make the re-settlement by the representation of his father that a portions' charge of £5,000 was not (as in fact it was) a subsisting charge on the estates, but was a charge to take effect only in case the father should so direct, and a release of the supposed power to charge contained in the re-settlement was the principal consideration for its execution:

Held, that, although this misrepresentation was innocently made, the re-settlement must be set aside as founded on mistake.

By articles entered into on the 25th of August, 1832, in consideration of an intended marriage between Lucy Harriet Benett (who was tenant in tail in remainder of certain settled estates) and Arthur Fane, Arthur Fane and Lucy Harriet Benett covenanted that in case the marriage should take effect, and A. B. Lambert and John Benett the elder (who were entitled to life interests in the settled estates) should consent, then the said Arthur Fane and Lucy Harriet Benett [699] would, when Lucy Harriet Benett should come *into possession of the settled estates, or prior thereto with the concurrence of A. L. Lambert and John Benett the elder, or such of them as would consent, suffer or join in suffering a recovery of, and settle or join in settling the estates to the use of such persons, for such estates and subject to such powers as A. B. Lambert and John Benett the elder, or such one of them as should concur in the settlement, should, together with Arthur Fane and Lucy Harriet his wife, or the survivor of them, by the recovery deed jointly appoint; and in default, to the use of trustees, their executors, administrators and assigns, for ninety-nine years, if Arthur Fane and Lucy Harriet his wife should so long live, in trust to pay the rents to Lucy Harriet Fane during the joint lives of herself and Arthur Fane, with remainder to the use of Arthur Fane and his assigns for his life, without impeachment of waste, with remainder to the use of Lucy Harriet Fane for

life, without impeachment of waste, and after the decease of Arthur and Lucy Harriet Fane, to the use of trustees, their executors and administrators, for the term of 1,000 years upon the trusts thereafter declared, and subject thereto, to the use of the first and every other son of Lucy Harriet Fane by Arthur Fane, or any after-taken husband, in tail male, with similar limitations to the sons of Lucy Harriet Fane, in tail general, followed by successive limitations in tail male and in tail general in favor of her daughters, and with divers limitations over. And it was declared that the trusts of the term of 1,000 years should be trusts by and out of the rents, or by sale or mortgage of the estates, or by other usual ways or means, to raise the sum of £5,000 for the portion of the daughters (other than an eldest or only daughter entitled in tail under the limitations aforesaid) and younger sons of the marriage, and to pay the same at such times and in such manner as Arthur Fane and Lucy Harriet Fane should during their joint lives by deed, or the survivor of them should by deed or will appoint, and in default equally among such child or children at twenty-one or marriage.

Shortly after the date of this indenture Arthur Fane and Lucy Harriet Benett intermarried.

By indentures of lease and release, dated the 8th and 9th of November, 1833, to which release A. B. Lambert, John Benett, the *elder, Arthur Fane, and Lucy Harriet, his wife, [700 were parties, after correctly reciting the articles of the 25th of August, 1832, including the provisions therein contained as to the term of 1,000 years for raising portions, and that by virtue of a common recovery duly suffered in pursuance of the said articles the estates were conveyed and assured to the intent that the recovery should enure and the lands stand and be limited as in the indenture of release expressed, it was by the indenture of release declared that, subject to the estates subsisting in priority to the estate tail of Lucy Harriet Fane, and to certain charges therein specified, the lands should stand limited to uses similar to those specified in the articles, including a limitation of a term of 1,000 years to M. Beresford and H. K. Seymer, their executors, administrators and assigns. And it was declared that the lands were so limited to them upon trust that if there should be any child or children of L. H. Fane and Arthur Fane (other than an eldest or only daughter entitled as aforesaid), "then and in such case they, the said Mr. Beresford and H. K. Seymer, or the survivor of them, their or his executors, administrators, or assigns, should after the decease of the survivor of

them, the said A. B. Lambert, John Benett, the elder, Arthur Fane, and Lucy Harriet, his wife, or the survivor of them, if they, he, or she shall so direct by any deed or writing," by any of the ways and means therein mentioned, raise the sum of £5,000 for the portion or portions of such child or children (other than as aforesaid), the said sum to be in trust for all or such one or more of them, to be an interest vested, and to be paid at such times, and if more than one in such proportions and in such manner, as Arthur Fane and Lucy Harriet, his wife, should by deed jointly, or the survivor of them should by deed or will appoint, and in default amongst such child or children in equal shares, and to be vested interests in such children, being sons, at twenty-one, and being daughters at twenty-one or marriage, in the usual manner.

Thus the charge of £5,000 for portions which, under the articles was an absolute charge, was, according to the language of the settlement purporting to be made in pursuance of the articles, only to take effect if Arthur Fane and Lucy Harriet, his wife, should "so direct."

701] *No direction to raise, or appointment of, the sum of £5,000 was ever given or made.

Lucy Harriet Fane died in the year 1845, having had issue the plaintiff Edmund Douglas Veitch Fane, her first-born son, the defendant, Henry Arthur Fane, Vere Fane (afterwards Vere Fane Benett Stanford), and three other children. Prior to the year 1858, A. B. Lambert and John Benett, the elder, both died. On the 6th of May, 1858, the plaintiff attained the age of twenty-one, and, according to his evidence, immediately thereupon his father, Arthur Fane, proposed to him that he should re-settle the lands comprised in the settlement, and as an inducement represented that, under the existing settlement he (Arthur Fane) was empowered to charge by way of portions for the children of his marriage, other than the plaintiff, the sum of £5,000, which would not be chargeable upon the lands unless he exercised the power, and he offered and promised to the plaintiff that if he would make the proposed re-settlement he (Arthur Fane) would make other provision for his other children, and would not exercise, but would release, his alleged power, which, having regard to the income of the lands, would be a material advantage to the plaintiff. The plaintiff, under his father's influence and this inducement, then consented to make the proposed re-settlement, and a disentailing deed and re-settlement were accordingly prepared upon the father's instructions by the father's solicitor,

who throughout the negotiations for and in carrying out the re-settlement acted as the adviser of the son, as well as the father, the former having no separate adviser.

The disentailing deed, which was dated the 7th of February, 1859, recited shortly the indenture of release of the 9th of November, 1833, referring thereto as a settlement executed subsequently to the marriage "in pursuance of articles entered into previously thereto;" but contained no other reference to such articles, and referred to the trusts of the term of 1,000 years as "certain trusts for raising the sum of £5,000 for the portions of the younger children of L. H. Fane by Arthur Fane, if the said A. B. Lambert, John Benett, the elder, Arthur Fane, and Lucy Harriet, his wife, or the survivor of them, should so direct." The operative part of the disentailing deed comprised the usual conveyance by the plaintiff as tenant in tail in remainder with the concurrence of his *father, Arthur Fane, as [702 the protector of the settlement (without prejudice to his father's estate for life and to certain specified incumbrances), to a trustee to the use of the plaintiff in fee.

The deed of re-settlement was dated the 8th of February, 1859, and its narrative recitals were similar to those in the disentailing deed, the trusts of the indenture of the 9th of November, 1833, with reference to the term of 1,000 years, being recited as trusts, "in case the said A. B. Lambert, J. Benett, the elder, Arthur Fane, and Lucy Harriet, or the survivor, should so direct, to raise and levy the sum of £5,000 for the portions of the younger children of the said Lucy Harriet Fane by Arthur Fane;" and it further contained an introductory recital that Arthur Fane and the plaintiff were desirous that the hereditaments comprised in the disentailing deed should be settled to the uses and in manner thereafter expressed, and that they had agreed to execute the assurance thereafter contained. The deed then witnessed that in pursuance of this agreement and in consideration of the premises, and of a nominal consideration, Arthur Fane and the plaintiff, according to their respective estates and interests, conveyed the lands (subject to the same incumbrances as those specified in the deed of the 9th of November, 1833), to trustees, their heirs and assigns, to the use and intent of confirming the life estate limited to Arthur Fane by the indenture of the 9th of November, 1833, with all powers and privileges annexed thereto or limited to him by the said indenture, "except the power of raising, or directing the raising of, the sum of £5,000 for the portions of his younger children," if the lands should vest in the

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plaintiff and his issue. And after the death of Arthur Fane the estates were limited to the use of the plaintiff and his assigns for his life, without impeachment of waste, with remainder to the use of his first and other sons in tail male, with remainder to the use of his daughters as tenants in common in tail general, with cross remainders between the daughters, with remainder to the use of Henry Arthur Fane, the third son of Arthur Fane, for life, with similar remainders in tail male and tail general in favor of his sons and daughters respectively, with remainder to the use of such persons and in such manner as the survivor of Arthur Fane, and the plaintiff should by deed or will appoint, and in 703] default to the *use of the plaintiff, his heirs and assigns forever. The deed then contained a joint power for Arthur Fane and the plaintiff to raise a sum of money by way of mortgage; powers for the plaintiff, and after his decease for Henry Arthur Fane, to charge jointures and to charge portions for younger children; and a release in the following terms: "And in further pursuance of the said recited agreement the said Arthur Fane doth hereby if the said hereditaments and premises to be conveyed shall vest in possession in the said E. D. V. Fane and his issue under the limitations hereinbefore contained, but in no other case or event, release and yield up unto" (trustees) "their executors, administrators and assigns the power of raising or directing the raising of the sum of £5,000 for the portions of his younger children so given or limited to him as aforesaid by the said recited indenture of settlement to the intent and so that the same power may in such event alone and not otherwise be absolutely released and extinguished."

Arthur Fane died on the 11th of June, 1872, and the plaintiff entered into possession of the settled lands. In August, 1872, the plaintiff discovered that under the articles of the 25th of August, 1832, the sum of £5,000 was an actual charge upon the settled lands, and the term of 1,000 years a subsisting term in equity instead of being, as he supposed, a charge and term only to take effect in case his father should so direct. A suit of *Stanford v. Fane* (1873 S. No. 169) was then instituted by Vere Fane Bennett Stanford, as one of the younger children of Arthur Fane, against the plaintiff, Henry Arthur Fane, and the trustees of the 1,000 years' term, in order to obtain a declaration that under the articles of 1832 the sum of £5,000 was agreed and intended to be provided as portions for the younger children in the settlement to be executed in pursuance thereof; that the plaintiff Stanford became under

the settlement of the 9th of November, 1833, or at all events under the articles of the 25th of August, 1832, entitled to one-fifth part of such sum ; that the term of 1,000 years was limited for the purpose of raising that sum ; that the indenture of settlement of the 9th of November, 1873, might be reformed so far as necessary for the purpose of effectuating its true intent, and for other incidental relief. This suit of *Stanford v. Fane* came to a hearing *before the [704 Vice-Chancellor Sir Charles Hall on the 9th of November, 1874, when his honor made a decree in favor of Mr. Stanford, declaring that according to the intent and upon the true construction of the indenture of the 9th of November, 1833, the sum of £5,000 became, upon the death of Arthur Fane, raisable out of the estates comprised in the same indenture, under the trusts declared concerning the term of 1,000 years thereby limited.

In the meantime, the plaintiff had instituted this suit against Henry Arthur Fane and the trustee of the re-settlement, charging that the indentures of the 7th and 8th of February, 1859, were obtained from and executed by him under parental influence, by surprise, and without professional advice, and upon a material misrepresentation, and under a material mistake as to the power of his father to release the charge of £5,000. And he prayed, by his bill, that the indentures of the 7th and 8th of February, 1859, or, at all events, that of the 8th of February, 1859, might be set aside and delivered up and be cancelled, and that directions might be given for vesting the estates in the plaintiff.

This suit now came on for hearing, it being admitted that the misrepresentations of Arthur Fane, the father, were innocently made.

Mr. *Dickinson*, Q.C., and Mr. J. *Beaumont*, for the plaintiff : This is the simple case of a re-settlement executed by a tenant in tail in remainder shortly after attaining full age, without independent advice, upon the faith of a representation by his father, the tenant for life, which, though innocently made, was untrue. In fact, as it turned out, the father gave up nothing, and the son got nothing, while giving up his estate tail in exchange for a life estate. Under these circumstances, the re-settlement, being founded on a mutual mistake, cannot stand, and the plaintiff is entitled to have it set aside, although there was no fraud in the transaction : *Cooper v. Phibbs* ⁽¹⁾. In that case Lord Westbury lays down that the maxim, "*Ignorantia juris*

⁽¹⁾ Law Rep., 2 H. L., 149, 170.

haud excusat," has no application when the word "*jus*" denotes private rights.

Mr. *Morgan*, Q.C., and Mr. *Vaughan Hawkins*, for the 705] defendants, *argued the case on behalf of the unborn children who would take under the limitations of the re-settlement:

This is a case of a family settlement, and to such cases the same principles must not be applied as to dealings between strangers. The mere exercise of the parental influence is no ground for setting aside family arrangements tending to the peace of the family and the avoiding of disputes, and the cases relating to the re-settlement of family estates, where the object is the preservation of the family property, are still stronger. Such re-settlements are favored by the court, and between father, tenant for life, and son, tenant in tail, barring the entail and re-settling the property, if the re-settlement is reasonable, neither apparent inadequacy of consideration nor want of professional advice in the son is sufficient ground for setting it aside: *Jenner v. Jenner* (*). *Hoghton v. Hoghton* (*) is the only case in which a bill of this sort has succeeded, but there, while a great part of the judgment of the Master of the Rolls is favorable to our contention, the grounds on which he set aside the settlement were that under it the father took direct benefits from the son, and that the settlement was not a reasonable one, nor properly explained to the son, neither of which considerations apply here.

Then as to the mistake with reference to the power of charging portions. That mistake was innocently made, and in the absence of fraud family re-settlements, being analogous to family arrangements, will be established, although founded on mistake: *Gordon v. Gordon* (*). The case of *Cooper v. Phibbs* (*) is distinguishable from and has no application to the present case.

Moreover, this is not the simple case of a settlement merely in consideration of the release of the charge. A mere supposition of a right is enough to support a family agreement: *Stapilton v. Stapilton* (*). Any particular part of the bargain is not the consideration itself. The main consideration is the family arrangement. And the failure of an item in the bargain is immaterial: *Stewart v. Stewart* (*). 706] The court will not, in cases of family *arrangement,

(1) 2 Giff., 232; 2 D. F. & J., 359.

(2) 15 Beav., 278.

(3) 3 Sw., 400-463.

(4) Law Rep., 2 H. L., 149.

(5) 1 Atk., 2; Tud. L. C. in Eq., 4th ed., p. 824.

(6) 6 Cl. & F., 911.

inquire into or consider the quantum of the consideration if there is a sufficient motive for the re-settlement, and that motive may either be the maintenance of the family peace or the preservation of the family property in its natural succession: *Gordon v. Gordon* ⁽¹⁾. If only, as is the case here, the settlement is fair and proper, then a mistake such as this is not sufficient ground for setting it aside: *Pullen v. Ready* ⁽²⁾.

SIR CHARLES HALL, V.C.: I should certainly not seek to disturb the course of the decisions as to re-settlements by father and son if I had the power (which I have not) to do so. They are not to be interfered with lightly, and the parental influence in reference to such re-settlements, where there is no other consideration or element in the case, is, I conceive, to be disregarded. Such must be taken to be the law: for the court has thought such re-settlements desirable, and has favored them; but every case must be looked at with reference to all the circumstances attending the re-settlement.

What you have in this case is this, that it was supposed that the property was subject to a sum of £5,000, but only in the event of the father choosing to say it should be so subject; that he had therefore the means and power of bringing into settlement as part of the transaction of re-settlement the sum of £5,000 by releasing his power to charge it. Whether a power of that kind was capable of being, or properly could be, used in any way to the advantage of the father for the purpose of obtaining a settlement to any extent in his own favor, is a question with which I do not mean to deal; but it is not to be overlooked that ordinarily such powers vested in a father cannot be made properly the subject of bargain with the son. It was supposed there was a power to him to charge portions in favor of younger children, while in fact portions were actually charged. The father made this representation: "I have got a power to charge portions in favor of my younger children, and will give that up if you will make a re-settlement." Ordinarily, as I have said, such powers are not capable of being used in such a way, and there are many cases familiar to counsel in which settlements have been set aside [707 simply because the father has attempted to use powers of jointuring and charging portions as a means of obtaining benefits accruing to the father from the re-settlement.

Passing that by, however, what we have in this case is, that the son, a young man who of course knew nothing about

⁽¹⁾ 3 Sw., 400-463.

⁽²⁾ 2 Atk., 587; Tu. L. C. in Eq., 840.

settlements and the mode of dealing with property, acts through the adviser of his father. Ordinarily, in re-settlements, there is no fault to be found with that; but the adviser of the father, who thus becomes the adviser of both, must, under such circumstances, take great care that the true state and position of the title to the property is accurately represented to the son. And in reference to that, in this particular case the right course would have been, not only to have looked into the settlement, which represented the property as only subject to the charge if the power was exercised, but also to have looked into the articles upon which that settlement was founded. The result of that investigation might or might not have been to satisfy the solicitor that the £5,000 was not in reality in the position in which the father, and apparently the father's solicitor also, supposed it to be. However, the father's solicitor acted upon the view that there was no question whatever of the father having this power, and that he could bring it into the re-settlement. It must be taken, therefore, that the adviser of the father, although acting in this transaction on behalf of the son also, represented to the young man just as much as he would have represented to the young man's adviser if he had had a separate adviser, that the father was in this position. That, in reality, was untrue. There was an incorrect representation made to the son, and, according to the son's evidence in this matter, that representation influenced him, and led him to make the re-settlement in question. And it is not a case of the son coming here simply with his own unsupported evidence, but the very instruments which are before the court show and prove to my satisfaction that his statement as to the false representation in that respect is correct. There can be no doubt whatever that the representation was made to the son as he alleges.

There being, then, that representation made to the son, it is said that although it was a mistake, yet, inasmuch as this 708] is in the *nature of a family settlement, and having regard to the cases with reference to compromises which are said to be a portion of the same class of cases, or to be cases to which the same considerations apply, the son is precluded from obtaining any relief in respect of the representation made to him. I do not understand the law to be so, and I think when the observations of Lord Eldon in *Gordon v. Gordon* (1) are referred to, those observations, far from supporting that contention, support a proposition of an entirely different character; that is to say, that if there is a mistake—

(1) 8 Sw., 400.

if there is a representation made to the person about to effect a settlement which is untrue, although honestly and innocently made, still, that representation being made, the person who effects the re-settlement is entitled under those circumstances to come to this court, and to have the re-settlement set aside upon the ground of mistake. Lord Eldon says⁽¹⁾, where he is dealing with the general question, and treating of the cases of *Stapilton v. Stapilton*⁽²⁾, and *Cann v. Cann*⁽³⁾: "Of the cases which have been quoted, *Stapilton v. Stapilton*, and *Cann v. Cann*, there is no necessity for me to say more than that they fully establish a principle of which I can have no doubt, that where family agreements have been fairly entered into without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a court of equity would have a very great difficulty in permitting such a contract to bind the parties."

Now, take the first part of that judgment, where he says, "with no suggestion of what is false." There was here a suggestion, and not merely a suggestion, but a positive statement in the instrument itself of that which was false, viz., a recital of the settlement expressly, clearly, and distinctly stating that the father had the power to charge this property with £5,000, and was about to give up that power. Let us, however, apply to this *case as nearly as we [709 can what Lord Eldon says in the same report, and those observations will show that an innocent statement of that which is untrue will not protect the transaction, even although it be a re-settlement between father and son. Lord Eldon there says⁽⁴⁾: "My opinion is, that if James Gordon, prior to the agreement, knew that there had been a private ceremony of marriage, and, conscientiously believing that it was not a legal marriage, omitted to communicate the fact to his brother, the plaintiff would be entitled to relief; on the principle that, though family agreements are to be supported, where there is no fraud or mistake on either side, or none to which the other party is accessory; yet where there is mistake, though innocent, and the other party is accessory to it, this court will interpose." Here there was an innocent

⁽¹⁾ 3 Sw., 468.⁽²⁾ 1 P. Wms., 728.⁽³⁾ 1 Atk., 2.⁽⁴⁾ 3 Sw., 467.

mistake; the father was, as I conceive, accessory by his solicitor to the mistake being made; and if that be so, this is a case in which, according to Lord Eldon, the court will interfere. The general observations of Lord Romilly in *Hoghton v. Hoghton* certainly tend in the same direction, for he says in that case⁽¹⁾: "The rule to be drawn from these cases, which is perfectly consistent with the rule which prevails in the first class of cases to which I referred, may, I think, be thus stated: that if the settlement of the property be one in which the father acquires no benefit not already possessed by him, and if the settlement be a reasonable and proper one, the court will support it, even though it may appear that some influence was exerted by him to induce the son to execute it; and provided also that there was no suppression of what is true, or suggestion of what is false. This is distinctly stated by Lord Eldon in *Gordon v. Gordon* as applied to family agreements, and will also apply to these cases of re-settlement: 'Although,' says he, 'the parties may have greatly misunderstood their situation, and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement.'" Then Lord Romilly goes on to say, and this is his own statement, "But where there is a mistake, though innocent, and the other party is accessory to it, this court will interfere. The point of this observation is, that the one is accessory to the mistake of the other."

710] *Therefore, treating this as a case in which there is jurisdiction, by reason of the mistake, it appears to me that, under that plain head of equity, notwithstanding the general rule in favor of leaning towards supporting family settlements, the plaintiff here is entitled to relief.

I may observe, further, that I am much struck with this point also, that the father did by the execution of this re-settlement obtain, as it seems to me, very substantial benefits. It is true that he gave up some of his rights. He gave up his right of charging portions, excepting that those portions are really not substantial things as regards the father's own interest, because those were only to be operative and to become charges upon the property after the son had come into possession, for I find an express clause in the re-settlement which provides for that. It is very odd that in this re-settlement I do not find that the father makes any provision for the son at all. He does not give the present annuity, which is usual. Then a number of limitations are struck out, which before existed under the old settlement.

(1) 15 Beav., 305, 306.

Only the issue of the two sons are provided for apparently by the limitations. There is, then, a joint power of appointment to the father, with an ultimate power of appointment to the survivor. If you look at the present state of things, there is no issue of either of the two sons for whose issue provision is made. It is quite on the cards that the father may be the survivor. It is a very substantial benefit which is acquired by that ultimate limitation, for it is a power exercisable immediately, though only taking effect in case he survives. The father could always say: I will not exercise that joint power of appointment given to us two, and I will take my chance therefore of thus acquiring the reversion. I have no doubt that the reversion of this estate in the market could be sold for a very considerable sum of money if it were offered for sale. That is not, however, the main ground upon which I rest my judgment. I think that, under all the circumstances, the plaintiff is entitled to be relieved from this re-settlement.

Solicitors: Mr. W. A. Day; Messrs. Farrer, Overy & Co.

[Law Reports, 20 Equity Cases, 711.]

V.C.H., July 16, 1875.

**In re ORLEBAR'S SETTLEMENT TRUSTS.* [711]

Settlement—Death of Tenant for Life “leaving a Child or Children”—Trust for “the Child or Children”—Death of Child after Twenty-one in lifetime of Tenant for Life—Vested Interest.

By a settlement trustees were directed to hold trust funds upon trust to pay the income to E. H. for life, and after her death, “leaving a child or children,” to transfer, pay, and make over the fund unto “all and every the child or children of the said E. H., and the issue of such of the said children as might be then dead” (such issue to take the parent's share), equally between them if more than one, the shares of sons to be transferred and paid at the age of twenty-one, and the shares of daughters at that age or marriage. Five of the children of E. H. survived her, and attained twenty-one or married, and one son of hers attained twenty-one and died without issue in her lifetime:

Held, that although the trust only took effect in case some one child survived E. H., the contingency upon which the trust took effect was not to be imported into the constitution of the class who were to take under the trust, and that the son who attained twenty-one and died in the lifetime of the tenant for life without issue took, nevertheless, a vested interest in the fund.

PETITION. By an indenture dated the 12th of July, 1821, being a settlement executed in consideration of the marriage afterwards solemnized between William Augustus Orlebar and Mary Caroline his wife, trust funds were assigned to trustees upon trust to pay the income to Mary Caroline Orlebar during her life for her separate use, and after her death to set apart so much of the *corpus* as would produce

the yearly sum of £600, and to pay that sum to William Augustus Orlebar during his life; and to hold the residue of the trust fund upon trust, in case there should be any children then living of the marriage, immediately after the death of M. C. Orlebar to assign, transfer, and make over the same among the children of W. A. and M. C. Orlebar, or the issue of any such of them as might be dead leaving issue, in such manner as M. C. Orlebar should appoint, and in default of appointment to transfer, pay, and make over the trust premises unto all and every the child and children of W. A. and M. C. Orlebar, and the issue of such of them as might be dead (such issue to take the parent's 712] *share), equally between them if more than one, and if there should be but one such child, then the whole to such only child, the shares of sons to be transferred to them at their respective ages of twenty-one, and the shares of daughters at their respective ages of twenty-one or days of marriage, which should first happen after the death of M. C. Orlebar. And it was thereby provided that in default of appointment, in case any such child or children being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry in the lifetime of M. C. Orlebar, then and from thenceforth his or her interest in the trust premises should be a vested interest, and should be transmissible as such to his, her, and their issue, notwithstanding the death of such child or children afterwards in the lifetime of M. C. Orlebar. And after a clause providing that if any such child being a son should die under the age of twenty-one, and without leaving issue at his death, or being a daughter should die under that age and unmarried, then the share provided for such son or daughter should accrue to the survivor or survivors and other or others of the same children, and the issue of such of them as might be dead having first acquired a vested interest in their respective original shares, to be equally divided between them, it was provided that in default of children of the marriage (which event happened) the trustees should, after the death of the said M. C. Orlebar (and subject to the payment of the said annual sum of £600 to the said W. A. Orlebar during his life) hold the trust fund upon trust to pay the annual proceeds thereof unto Elizabeth Hancock and Maria Orlebar (two of the sisters of M. C. Orlebar) during their respective lives in equal shares for their separate use, "and after the decease of either of them leaving a child or children, then as to one moiety of the whole of the trust premises, upon trust to assign, trans-

fer, pay, and make over the same unto, between, and among such one or more of the children of the said Elizabeth Hancock and Maria Orlebar, who should first happen to depart this life, or the issue of such children as might be then dead leaving issue living at his or their death, or born in due time afterwards, at such age" and in such manner as the said Mary Caroline Orlebar should by deed or will appoint, and in default of appointment then upon *further [713 trust to transfer, pay, and make over the said moiety whereof there should be no such appointment "unto all and every the child or children of the said Elizabeth Hancock or Maria Orlebar, who should first happen to depart this life, and the issue of such of their said children as might be then dead (such issue to take the share of his or her parent), equally between and among them (if more than one), share and share alike, and if there should happen to be but one such child, then the whole to such only child, the share or shares of such of them as should be a son or sons to be transferred and paid to him or them at his or their age or respective ages of twenty-one years, and the share or shares of such of them as should be a daughter or daughters to be transferred and paid to her or them at her or their age or respective ages of twenty-one years or days of marriage, which should first happen. And it was thereby declared that if any such child being a son should die under the age of twenty-one years without leaving lawful issue, and if any such child being a daughter should die under that age and unmarried," then in default of and subject to any appointment, the share of each such son or daughter so dying should "accrue to the survivor or survivors, and other or others of the same children, and the issue of such of them as might be dead, having first acquired a vested interest in their respective original shares thereof, and be equally divided between such survivors or others of them, and the issue of such of them as might be dead as aforesaid (if more than one), share and share alike, and the same should become vested, and transferable, and payable at such respective ages, days, and times as were thereby provided and declared touching his, her, or their original share or shares, and that such benefit of survivorship or accruer should extend as well to the surviving or accruing as to the original shares. And from and immediately after the decease of the survivor of them the said Elizabeth Hancock and Maria Orlebar leaving a child or children, or the issue of any such child or children living at her death," the trustees were directed to stand possessed of the other moiety of

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the trust premises upon trusts for the benefit of the child, children, or issue of the survivor of Elizabeth Hancock and Maria Orlebar similar to those declared concerning the first 714] moiety thereof. And it was declared that if *either of them the said Elizabeth Hancock and Maria Orlebar should die without leaving any child or children or any issue of such child or children who should live to attain a vested interest in the fund in manner thereinbefore mentioned, then the trustees were thereby directed to stand possessed of the annual proceeds of such moiety of the fund of her whose issue should so fail in manner aforesaid for the benefit of the survivor of them the said Elizabeth Hancock and Maria Orlebar during her life, and after the decease of such survivor to stand possessed of the principal thereof for the benefit of the child or children of such survivor and his, her, or their issue upon the same trusts as were thereinbefore declared concerning the first-mentioned moiety of the trust fund.

There was no issue of the marriage of W. A. and M. C. Orlebar, and they were both dead, M. C. Orlebar having died in March, 1859.

Elizabeth Hancock died on the 17th of November, 1861, leaving Maria Orlebar her surviving, and having had six children, viz., the five petitioners, all of whom had attained twenty-one, or, being daughters, had married, and one son, who had died in her lifetime. The deceased son, Major Fitzharding William Louquet Hancock, attained twenty-one, and died on the 28th of January, 1858, without issue, having by his will bequeathed all his personal estate to his widow, and appointed her sole executrix.

Mrs. M. C. Orlebar had exercised her power of appointment in respect of a portion of the moiety settled on Mrs. Hancock and her children; and the surviving trustee of the settlement having paid into court under the Trustee Relief Act, a sum of £662 11s. 9d., as representing the share to which Major Hancock would have been entitled in the unappointed residue in case he had been living at the death of his mother, this petition was presented by his five surviving brothers and sisters for payment out to them of the sum paid in, in order to raise the question whether it was divisible amongst them, or passed to his legal personal representative.

Mr. *Morgan*, Q.C., and Mr. *E. Beaumont*, for the petitioners: The limitations of the settlement expressly provided 715] vide, in the case *of the children of the marriage of Mr. and Mrs. Orlebar, that in default of appointment every

child attaining twenty-one, or being a daughter marrying, shall take a vested interest in the trust fund, notwithstanding his or her death in the lifetime of Mrs. Orlebar, the tenant for life; but there is no such provision as to a child of Mrs. Hancock attaining twenty-one, and dying in her lifetime.

This is not a case in which the word "leaving" can be construed as "having," or "having had." By the terms of the settlement the limitations in favor of Mrs. Hancock's children cannot take effect unless she dies leaving children living at her death, and the whole disposition imports contingency as to the objects to take. The case is within the authority of *Bythesea v. Bythesea*(¹), although that case goes further, inasmuch as in it there was actually an express declaration as to vesting at twenty-one, which here is only to be found with regard to the settlor's children.

Woodcock v. Duke of Dorset(²), which was referred to in *Bythesea v. Bythesea*, is distinguishable from the present case. The limitations of the settlement in *Woodcock v. Duke of Dorset* are not correctly given in the report of that case in 3 Brown, but will be found in a note to *Howgrave v. Cartier*(³), the actual words being to "the children," not to "such child or children," and there the event was answered by the survivor leaving one child living; and, moreover, there was no provision, as in this case, for the issue of a child who dies in the lifetime of the tenant for life. These distinctions make *Woodcock v. Duke of Dorset* an authority in our favor. If this were the case of a will, it is clear that no child predeceasing the parent could take: *Bythesea v. Bythesea*; *Wilson v. Mount*(⁴); *Sheffield v. Kennett*(⁵); *In re Watson's Trusts*(⁶); and precisely the same principles apply. The condition that each child must outlive the tenant for life is part of the gift itself. The recent case of *Jeyes v. Savage*(⁷), which arose upon a settlement the terms of which are similar in many respects to this, is also an authority in our favor.

It is also observable in this case, that when the settlors are *providing for their own children they are careful [716 to insert a provision to meet the contingency which has happened in the case of the sister's children, although the construction would have been stretched in favor of their own children, while they omit to insert the provision in the case

(¹) 23 L. J. (Ch.), 1004.

(²) 3 Bro. C. C., 569.

(³) 3 V. & B., 79.

(⁴) 19 Beav., 292.

(⁵) 27 Beav., 207; 4 De G. & J., 593.

(⁶) Law Rep., 10 Eq., 36.

(⁷) Law Rep., 10 Ch., 555.

of the children of collaterals, in whose favor the construction would not be stretched. Again, there is no trust for the children of Mrs. Hancock distinct from the direction to pay, and the fact that the settlors have expressly provided for the issue of a child dying in the lifetime of a tenant for life shows that they did not contemplate that a child so dying would have taken a vested interest, for had he done so he would have been able himself to make provision for his own children. Therefore, upon authority, and upon the construction of the whole settlement, no child of Mrs. Hancock took a vested interest unless he or she survived Mrs. Hancock, and attained twenty-one or married, and Major Hancock having died in her lifetime, can take no share in the unappointed residue.

Mr. *Greene*, Q.C., and Mr. *Kingdon*, for the legal personal representatives of Major Hancock, and Mr. *Franklen* for the surviving trustee of the settlement, were not called upon.

SIR CHARLES HALL, V.C.: I think that I must construe this instrument according to what I take to be the actual meaning of the words used in the trust for children; that is to say, as a trust in favor of "all and every the child or children of the said Elizabeth Hancock and the issue of such of their said children as might be then dead." The words are "unto all and every the child or children of Elizabeth Hancock," with a substitution of issue for such as might be dead; and the words "all and every the child or children," as I construe them, include all the children and not merely those who survive the tenant for life; and the fact of any children or issue taking being made dependent on the fact of some one child surviving, is not, in my judgment, according to the language of the instrument, or according to authority, sufficient to cut down the objects to take to those alone who are mentioned as being only to take provided one object survives; in other words, that the 717] *contingency upon which the gift is to take effect is not to be imported into the constitution of the class who are to take under the trust itself.

The argument is specious and ingenious, and has been very ably pressed, that because there is a provision for the issue of children the court is to put a different construction upon the trust in favor of the children to that which it would otherwise bear. If we had to make a new trust there might be a great deal to be said for that, no doubt; but I cannot, by reason of those provisions for the issue, or by reason of contrasting this set of trusts with another set

of trusts, in which there is an express provision as to the vesting in children, which was no doubt inserted from an anxiety to provide unquestionably and clearly for the offspring of the intended marriage—I cannot for these reasons vary and alter the construction of the trust for the children which occurs in the first part of these trusts which are under consideration.

The authorities which have been referred to in support of the contention that children must survive in order to take—in other words, that inasmuch as one child must survive in order that any of the children may take, therefore all the children must survive, or otherwise they cannot take—do not, in my opinion, oblige me to hold that to be the true construction. The case of *Bythesea v. Bythesea* (¹), looking at it on the whole, was, I consider, a case in which the court was pressed to construe the instrument with reference to the case of *Woodcock v. Duke of Dorset* (²) and cases of that class. It was thought that those cases did not govern *Bythesea v. Bythesea*, nor do I hold that those authorities govern the case now before me. But in that case there ran through the whole of the trust, as I read it, words which confined the class to take to those or one of those who were specified in the words introducing the trusts for the children; in other words, that everywhere throughout it was stated that it was to be “such” children who were to take.

The case before the Master of the Rolls of *Wilson v. Mount* (³) is certainly not open to the same observation. The Master of the Rolls in giving judgment in that case does not appear to have referred to the particular trust in which the word “such” did not occur, and his judgment depends upon the occurrence of this word “such” throughout, and the whole reasoning proceeded upon that.

The authority which ought to govern the present case is, in my opinion, *Boulton v. Beard* (⁴). That case was heard before the Lord Justice Knight Bruce and Lord Justice Turner. The Lord Justice Knight Bruce, as we all know, always leant towards vesting in all these cases, and brought some cases within the influence of *Woodcock v. Duke of Dorset* (²), and cases of that class, which apparently, having regard to the decision of the Lords Justices in *Jeyes v. Savage* (⁵), will probably not hereafter be considered as within the range of those decisions. The case of *Boulton v. Beard*, I observe, was decided about a year and a half

(¹) 23 L. J. (Ch.), 1004.

(²) 3 Bro. C. C., 569.

(³) 19 Beav., 292.

(⁴) 3 D. M. & G., 608.

(⁵) Law Rep., 10 Ch. 555.

before the decision in *Bythesea v. Bythesea* ⁽¹⁾, and I cannot suppose that Lord Justice Turner, in deciding *Bythesea v. Bythesea*, meant to depart from the judgment he had given in *Boulton v. Beard*, about a year and a half before.

The trusts in *Boulton v. Beard* were trusts of one-tenth to or for the use of R. H., and another one-tenth to or for the use of C. R., for their respective lives; and in case either of them should die in the lifetime of the tenant for life, or afterwards, leaving lawful issue, then the testatrix directed that the part of him or her so dying leaving lawful issue should go and be equally divided among his or her children as they should attain twenty-one. And it was held that a child of C. R. who survived the tenant for life and attained twenty-one, but died in the lifetime of C. R., took a vested interest. What Lord Justice Knight Bruce said in his judgment was this ⁽²⁾: "The question is, whether a child of Catherine Rayner, who, after the testatrix's death, died in the lifetime of Catherine Rayner, having attained twenty-one, took a vested interest in the part of the share of the residuary estate of which Catherine Rayner was tenant for life. Upon this question no doubt could have arisen if the case had simply been one of a gift to Catherine Rayner for life, and after her death in the language of the will, omitting the condition of Catherine Rayner leaving lawful issue. Would the case be varied if by a separate clause the testatrix had declared that if Catherine Rayner should *die without leaving issue her share should fall into the residue, or go as in case of intestacy? No one will argue that this would have caused a difference. We should be making a will, and guessing away what is plain, if we acceded to the argument addressed to us on behalf of the defendant." The question had been previously decided by the Master of the Rolls in the same way, and Lord Justice Turner, in the course of his judgment, said ⁽³⁾: "I concur entirely with the construction which the Master of the Rolls has put upon this will. The first argument in support of a different construction is, that the bequest to the children of Catherine Rayner being only given in the contingent event of her leaving issue, therefore only the children who were living when the contingency happened would take. That argument would go to a great extent, and affect many decisions, affirming, as it must, the principle that where there is a gift to a class upon a

⁽¹⁾ 23 L. J. (Ch.), 1004.

⁽²⁾ 3 D. M. & G., 612.

⁽³⁾ 3 D. M. & G., 611.

contingent event, the time of the happening of the contingency determines the individuals composing the class. That is not the rule. Another argument was, that there is no bequest except in the direction to pay. But Sir James Wigram has well laid down the rule with reference to questions of this description in *Bull v. Pritchard* (¹). He there says, "There are two classes of cases, under one or the other of which the present case must fall. One class is where the devise is to a party at a given age, and the property is given over if the devisee dies under that age. The other is where the description of the devisee is such as to make the given age part of that description. In cases of the former class the court has discovered an intention expressed in the will that the first devisee shall take all that the testator has to give except what he has given to the devisee over; and in order to give effect to that intention has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over: *Phipps v. Akers* (²). In the second class, the court has held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required—that otherwise he did not answer the entire description': *Festing v. *Allen* (³). In this [720] case the gift to the children, in the event of the parent leaving issue, is absolute upon their attaining twenty-one, and the description of the children who are to take is not qualified. Nor is there anything in the fact of there being a gift over, as in the present case; it is only a provision for a particular event.

Another case in favor of this view is *M'Lachlan v. Taitt* (⁴); there there was a gift to two persons, E. A. and S. G., for their lives, and if either should die without leaving issue upon trust for the survivor for life; but if either should die leaving issue, then one moiety to the children of E. A., and one moiety to the children of S. G., "and to their respective heirs, executors, and assigns as tenants in common, the said children to become beneficially interested on the death of their respective parents." There it was held, affirming the decision of the Master of the Rolls, that the children of E. A. and S. G. acquired vested interests respectively on their births, and not upon the death of their respective parents. That is to say, that although it was only

(¹) 5 Hare, 567, 571.

(³) 5 Hare, 573.

(²) 9 C. L. & F., 583; 4 Man. & G., 1107; 3 Cl. & F., 793.

(⁴) 30 L. J. (Ch.), 276.

a gift to them if the parent should die leaving issue, that still all were entitled to take, whether they survived their own parent or not, if any one survived the parent. That appears to me to be the present case. There is a trust for the children, although upon a contingency that some one child should survive. I therefore take the words as I find them.

I think the reasoning upon the subject of the provision for the issue, and the other arguments founded upon the context, are not sufficient to outweigh what is the plain interpretation of the trust for the children. All beyond is speculative, and insufficient to take away and detract from the clear meaning of the words of the trust for the children. Therefore there must be a declaration to that effect.

Solicitors: Messrs. *Shepherd & Sons*; Messrs. *Baker, Forder & Upperton*; Messrs. *Iliffe, Russell & Iliffe*.

[Law Reports, 20 Equity Cases, 721.]

V.C.H., July 24, 1875.

721]

*WATSON V. WOODMAN.

[1872 W. 191.]

Partnership, Dissolution of—Debt due from Solicitors and General Agents to Client—Part payment by continuing Partner—Statutes of Limitation—Express Trust—Mercantile Law Amendment Act, 1856.

After a dissolution of partnership, by which the continuing partner covenanted *inter alia* to pay the debts and to pay the retiring partner a sum equal to half the next half-year's profits:

Held, that part-payment of a debt by the continuing partner during the said half year could not be set up against the retiring partner as an answer to the Statutes of Limitation.

Held, also, that though the debt was from solicitors to a client in respect of moneys received, there was no express trust to exclude the operation of the statutes.

WILLIAM J. P. WATSON, who died on the 29th of December, 1870, by his will, dated the 19th of November, 1869, after appointing the defendants Edward T. Row and Benjamin Woodman trustees and executors thereof, devised and bequeathed to his brother Robert Watson (the plaintiff) for life all his real and personal estate, and after his death to the use of his first and other sons in tail male, with remainder to the use of all his daughters as tenants in common, with remainder to the use of his (the testator's) right heirs. The testator directed that Benjamin Woodman should, notwithstanding his being a trustee, be entitled to

charge for all professional business done by him with reference to the trusts of the will.

The defendants William Woodman and Benjamin Woodman carried on business in partnership as attorneys and solicitors at Morpeth from the year 1857 to the 1st of June, 1866. For several years prior and down to the 1st of June, 1866, William and Benjamin Woodman were employed by the testator as his solicitors and general agents, and from that date Benjamin Woodman continued to be so employed by and to act for the testator down to his death. In the course and as part of such employment William and Benjamin Woodman received divers large sums of money on account of the testator, to be held by them for him and to be applied as he should from time to time direct, and in particular they on the 18th of November, 1865, received for him a sum of £5,000, which the testator had borrowed on mortgage from the Equitable Reversionary Loan Investment Society, and in that and the following month they received for him other sums, amounting in the aggregate to upwards of £1,032, from divers persons. They made payments out of the moneys so received by them to and by the direction of the testator, by means of which, and of the retention of a sum of £210 10s. for costs, the moneys in their hands in respect of such sums were reduced to the sum of £1,590 12s. 5d. The last payment in respect of such sums was made by a check for £300 drawn by Benjamin Woodman in favor of the testator on the 20th of July, 1866, and paid by the bankers of Benjamin, out of moneys standing to his credit, on the following day. This bill was filed on the 20th of July, 1872, for an account of all dealings and transactions of William Woodman and Benjamin Woodman, as solicitors and agents of the testator, down to the 1st of June, 1866, and of all moneys received by them respectively for or on his account down to that date, and of the application thereof, and for payment of what might be found due from them.

By an indenture dated the 1st of June, 1866, expressed to be made between William Woodman of the one part and Benjamin Woodman of the other part, after reciting the articles of partnership dated the 1st of January, 1857, for twenty-one years, that it had been agreed that William Woodman should retire from the profession of attorney and solicitor, and that the partnership should be dissolved upon the terms therein contained, it was witnessed that, in pursuance of the agreement and in consideration of the covenants therein contained, they did mutually dissolve and

determine the partnership from that date, and did release each other from all the covenants and provisions of the indenture of partnership. It was agreed between them that all the office furniture, law and other books, and all papers, and also the good-will of the business, should become the exclusive property of Benjamin, and that all the credits and book debts of the partnership should with all convenient speed be collected and got in by him; and he should in the first place thereout pay and discharge all debts and liabilities owing or incurred by him and William Woodman in 723] *respect of the partnership, and should pay to William Woodman such sum of money as should be due to him under the indenture of 1857, and should retain the residue for his own benefit; and Benjamin Woodman expressly agreed that either out of the credits and book debts, or out of his own proper moneys, all the debts and liabilities owing or incurred by the partnership should be paid and discharged before the 31st of December, 1866.

Benjamin Woodman covenanted that he would, on or before the 1st of March, 1867, pay William all such sums of money as should be due to him under the indenture of 1857, and also a sum equivalent to one moiety of the net profits made by him in carrying on the business and matters before carried on by the partnership between the 1st of June, 1866, and the 31st of December, 1866; and also that all the debts and moneys appearing to be due and owing to the partnership by the books thereof, as well as all moneys to become due before the 31st December, 1866, for the business to be carried on by Benjamin, should be guaranteed by him and accounted for in full; and further, that Benjamin would, as from the 1st of January, 1867, during the joint lives of himself and William, pay to William, or his assigns, the yearly sum of £500 by equal quarterly payments; the first payment to be made on the 1st of April, 1867, if William should be then living; that if Benjamin should survive William he would, during the term of five years from the death of William, if Benjamin should so long live, pay William's executors the yearly sum of £200 by equal quarterly payments; and that during the life of William, Benjamin should take no partner without the consent in writing of William, and that before any person should become a partner with Benjamin, either during the life of William or within five years after his death, such person should enter into a covenant with William, his executors, or administrators, for the performance of all such covenants therein contained on the part of Benjamin as should be then unfulfilled;

and also, that in the event of the death of Benjamin no person should be entitled to the papers and good-will of the business, either of the partners or of Benjamin solely, without the like consent, and in like manner entering into such covenant; and that in the event of Thomas Benjamin Woodman, son of William, and then an articulated *clerk [724 with the parties, being admitted as an attorney and solicitor within twelve months after the expiration of his articles, he should be admitted to one-fourth share of the business for three years, and then to one-third share, provided William, if living, should give up one-third of his yearly sum of £500; but that covenant was in no way to affect the yearly sum of £200; and further, that William, his executors, &c., should have a lien or charge on Benjamin's share of the credits and book debts of the partnership, and also on the future credits and book debts of Benjamin, in respect of the business carried on by him, for the annuities and other moneys covenanted to be paid by him; and also that William should at all times have free access to all the books, deeds, and papers then belonging to or in the possession of the parties thereto as partners.

By an indenture dated the 18th of April, 1867, made between William Woodman (described as of Morpeth, attorney and solicitor) of the one part, and Benjamin Woodman of the other part, after reciting the partnership indenture of January, 1857, and the indenture of the 1st of June, 1866, and that upon taking the accounts of the partnership it had been found that Benjamin had drawn out of the assets for his own use to the 1st of June, 1866, sums in excess of his share of the profits; that William had left in the partnership sums which had become due to him on account of his share of the profits; that the debts and moneys appearing to be due and owing to the partnership on the 1st of June, 1866, had been found to have been to a great extent already received by Benjamin, or to be irrecoverable, and that there would arise on that account a large deficiency; that it had been found that the debts and liabilities owing by the partnership on the 1st of June, 1866, exceeded the amount then appearing by the books; and that Benjamin having been wholly unable out of his own moneys to discharge, before the 31st of December, 1866, such debts and liabilities, and the assets of the partnership being wholly insufficient to discharge the same, Benjamin had applied to William to discharge such of the same as were required and proper to be discharged out of his moneys, which he had agreed to do upon having certain alterations of the provisions of the deed

of June, 1866, made, and such additional security for the 725] payment of the sums due and to become *due from Benjamin on the partnership account, and under the deed of June, 1866, as was therein contained; and after reciting that, under the circumstances therein appearing, Benjamin was bound to pay to William, upon the partnership account, the sum of £3,679 18s. 2d.; that the annuity to William was wholly in arrear; and that William had advanced to Benjamin, since the 1st of June, 1866, sums to enable him to carry on the business amounting to £630, and that William had made further payments out of his own moneys, in respect of the partnership liabilities, amounting to £544 17s. 2d., and it was apprehended that it would be necessary for him to make further payments on the said account, and to make to Benjamin further advances for the purpose of carrying on his business. Benjamin covenanted with William to pay on demand to him, his executors, &c., the sum of £4,309 18s. 2d., with interest at £4 per cent., and also all further moneys which might be found to be due from him to William on the partnership account, and under the deed of June, 1866; and it was agreed that in the event of breach by Benjamin of any of the covenants, all the office furniture, books, and papers belonging to the partnership should not be the property of Benjamin, but the exclusive property of William; that the good-will of the business carried on by the partnership should not be the property of Benjamin, but should be the exclusive property of William, and that William should be at liberty to carry on the business of an attorney and solicitor at Morpeth as from the 25th of December, 1866. Benjamin undertook to keep proper books of account, and to allow William to have access to them; and there were stipulations that Benjamin should not sell his business, or any interest therein, without William's consent in writing; that William might, in case of breach by Benjamin of any of his covenants, sell the whole or any part of the business carried on by Benjamin, and receive the purchase-money for the same, and that nothing therein contained should extend or be construed to extend to constitute William a partner with Benjamin in his business, or to make him liable to other persons for any liabilities to be incurred by Benjamin in carrying on the business. Since the execution of the deed of April, 1867, William had carried on business as an attorney and solicitor at Morpeth. Benjamin made default in payment 726] to *William of the moneys covenanted to be paid to him, and thereupon William claimed to be entitled

to the office furniture and all the books and papers belonging to the partnership on the 1st of June, 1866, and attempted to take possession; but Benjamin disputed the right of William to do so, and an arrangement was come to between them, which was carried out by a deed dated the 24th of December, 1870, and by which, after reciting in effect the three previous deeds of January, 1857, June, 1866, and April, 1867, and *inter alia*, that there were certain sums due by Benjamin to William, and that Benjamin had not performed his covenants, Benjamin covenanted with William that he would pay and discharge all debts and accounts (if any) then due or owing, or which might become due or owing, in any manner for or on account of the partnership, and also that he would indemnify William for all such partnership debts and accounts.

Benjamin Woodman, who had died since the institution of the suit, by his answer stated that William Woodman and himself, from the 29th of December, 1863, down to the dissolution of the partnership (i.e., about two years and five months), acted as the solicitors and as the general agents or as agents of the testator, and during that period they received and (including a payment of a sum of £300 made on the 20th of July, 1866, which was a payment made on account of the firm) they paid on his account several sums of money mentioned in an account set forth in a schedule to the answer; and that it was the fact that, at the death of the testator, the sum of £1,590 12s. 5d., and no more, remained due and owing to him from them on account of the partnership debt, and that the same still remained due and owing to the estate of the testator from William Woodman and himself.

In the pleadings a letter, written on the 6th of April, 1872, by William Woodman to his solicitor at that time, was set forth. It and the evidence in the cause are sufficiently referred to in the judgment.

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the plaintiff: First. Under the course of dealing between the testator and the firm an express trust was created of the moneys received by B. and W. Woodman, and the Statutes of Limitations are excluded: **Burdick v. Garrick* ('). [727 Secondly. The payment by Benjamin of £300 on the 21st of July, 1866, was a payment on behalf of himself and William, as appears from the entire transaction: *Watson v. Pears* ('); *Robinson v. Waddington* ('); *Reg. v. Justices*

(') Law Rep., 5 Ch., 233.

(') 2 Camp., 294.

(') 13 Q. B., 753.

of *Derbyshire* (¹); Fisher's Harrison's Digest (²); *Winter v. Innes* (³); *Way v. Bassett* (⁴); Lindley on Partnership (⁵). Lastly. The partnership was not really dissolved till December, 1866, for William retained his profits to that date; and it follows that the payment was on account of both partners, and is an answer to the statute.

They also referred to Lindley on Partnership (⁶); *Clayton's Case* (⁷); *Simson v. Ingham* (⁸); *Mills v. Fowkes* (⁹); *City Discount Company v. McLean* (¹⁰), and submitted that they did not govern this case, as here there was not a continuing account after the payment of the £300.

Mr. *Methold*, for Miss Watson, interested under the will of the testator in remainder, supported the plaintiff's case.

Mr. *Cotton*, Q.C., and Mr. *Chisholm Batten*, for the defendant, William Woodman: The Statutes of Limitation (21 Jac. 1, c. 16, s. 3; 3 & 4 Will. 4, c. 42, s. 3; 16 & 17 Vict. c. 113, s. 20) are an answer to this claim, and a complete bar in respect of any balance due to the testator on the 1st of June, 1866. We also rely upon the 14th section of the Mercantile Law Amendment Act, 1856, which enacts, in reference to those statutes, that when there are two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, 728] interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators. Looking at the state of the law as it existed before 1856, and at the alteration made in it by that act, the payment of the £300 cannot be considered as a payment made by William Woodman, or as a payment made by Benjamin as the agent of William. The observation in Mr. Lindley's book is the only thing that could be relied upon for the plaintiff.

Burdick v. Garrick (¹¹) was quite distinct from the present case, as that was one of a power of attorney to sell property, and to invest the proceeds. There was really no fiduciary relation between the parties, as is shown by the decisions in *Blair v. Bromley* (¹²), *In re Hindmarsh* (¹³), and *Foley v.*

(¹) 7 Q. B., 193.

(²) Vol. iv., 8322, *et seq.*

(³) 4 My. & Cr., 101.

(⁴) 5 Hare, 55.

(⁵) 3d ed., 473, note 476.

(⁶) Vol. i., p. 442.

(⁷) 1 Mer., 608.

(⁸) 2 B. & C., 65.

(⁹) 5 Bing. N. C., 455.

(¹⁰) Law Rep., 9 C. P., 692-699.

(¹¹) Law Rep., 5 Ch., 233.

(¹²) 2 Ph., 354.

(¹³) 1 Dr. & Sm., 129.

Hill ('). The same doctrine is applicable to bankers and solicitors, as it is a very common thing for solicitors to act as *quasi* bankers. Co-contractors of every kind are within the statute, and part payment is not sufficient to take a debt out of it, unless it can be inferred that it amounted to an implied promise to pay the residue of the debt: *Jackson v. Woolley* ('); *Tanner v. Smart* ('); *Morgan v. Rowlands* ('). [They also referred to *Rolfe v. Flower* (').]

Mr. *Cozens-Hardy* appeared for the defendant Row, and asked for his costs as against the plaintiff.

Mr. *Dickinson*, in reply.

SIR CHARLES HALL, V.C.: William J. P. Watson, deceased, who, for the purposes of this suit, must be taken to be duly represented by the plaintiff, and who may be conveniently referred to as the testator, was a client of a firm of solicitors consisting of William Woodman and his son Benjamin Woodman. The firm received moneys on account of the testator, and was, when the firm dissolved partnership, which it did on the 1st of June, 1866, indebted to the testator in respect of such moneys in a considerable sum.

*[The Vice-Chancellor referred to the provisions of [729 the indenture of dissolution of partnership and continued:]

The two partners subsequently altered their arrangements, and in reference thereto two other deeds, dated in April, 1867, and December, 1870, were executed. By the deed of 1867 it was, in effect, stated, amongst other things not important for the purposes of this suit, that the partnership assets were insufficient to pay the partnership liabilities, that Benjamin had not been able to pay them out of his moneys, that William had made large advances for that purpose, and that it was apprehended it would be necessary for him to make further payments on that account.

The plaintiff has contended that the arrangement in June, 1866, was such as not to amount to a complete dissolution of the partnership; and further, that the two partners acted so as that for the purposes of this suit they should be deemed to have continued partners; but it appears to me that there was a complete dissolution of partnership, at least as regards any right of Benjamin to do anything to the detriment of William in reference to the then existing debts and liabilities of the partnership, and I do not think it is made out that the two parties have so acted that they should

(1) 2 H. L. C., 28.

(2) 8 E. & B., 778.

(3) 6 B. & C., 603.

(4) Law Rep., 7 Q. B., 498-498.

(5) Law Rep., 1 P. C., 27-44.

for the purposes of this suit be deemed to have continued partners. The plaintiff seeks in this suit to recover from William the sum owing from the firm to the testator, as I have before stated, less a sum of £300 paid as afterwards mentioned. William relies on the Statutes of Limitation as a bar to the plaintiff's claim. To take the case out of the statutes, the plaintiff relies on a payment of £300 made by Benjamin on the 21st of July, 1866. William says that such payment does not take the case out of the statutes. He says that sect. 14 of the Mercantile Law Amendment Act, 1856, applies, and that Benjamin after the dissolution could not deprive his co-debtor (William) of the benefit of that statute. There was an endeavor on the part of the plaintiff to meet this contention of William by the argument that the payment of the £300 ought to be deemed to be a payment by the two partners, although made by the hand of Benjamin, and that the position of Benjamin under the provisions of the deed of 1866, taken in connection with the [730] statement in Benjamin's answer, supported *such contention. It appears to me that this endeavor to meet the defence of the statutes cannot prevail. The deed does not purport to constitute Benjamin the agent of William for any purpose, and the payment of the £300 must, I think, be taken to have been a payment by Benjamin solely in respect of his obligations under the deed of 1866. Benjamin has in his answer treated the payment as a payment on account of the firm, and as on account of the partnership debt, which in a sense it was, there being, undoubtedly, a debt from the two partners to the testator; but it was not, I conceive, a payment by Benjamin, as William's agent, expressly or impliedly constituted to make the payment. To hold otherwise would, it seems to me, be to disregard the clear and express words of the 14th section of the Mercantile Law Amendment Act, 1856, and to render inoperative that statute as regards one class of co-debtors, viz., persons who while partners become co-debtors, and have ceased to be partners. If while the partnership subsisted each partner could and should be deemed to be the agent of the other to make payments, so as to exclude the operation of the statute, such agency, I consider, terminated on the dissolution of the partnership; no such agency being by the deed of dissolution expressly or necessarily or otherwise impliedly created. During the partnership the Mercantile Law Amendment Act was, I consider, inapplicable, payments made by either partner being payments of the firm. But on the partnership determining, payments by one could only

be the payments of both the persons who had been partners by proof of such one being authorized to make the payments as the payments of the other. As regards the statements in Benjamin's answer which bear upon this, it is to be observed that they are not very clear and explanatory in their terms; and although the plaintiff included such answers in the evidence, of the reading of which, as against William, he gave William notice, it is not, I think, unimportant, in estimating the weight of the evidence contained in such answers, to bear in mind that Benjamin is dead, and has not been cross-examined; and it must be remembered that William swears that he never, after the dissolution, directly or indirectly, paid anything to the testator on account of the partnership debt. The *cases of [731] *Thompson v. Waithman* (1) and *Bristow v. Miller* (2) support the view I have taken; and the former of these cases I consider an important authority as to this, although it has since, in *Jackson v. Woolley* (3) and other cases, been held that the Vice-Chancellor took an erroneous view in holding the Act of Parliament to be retrospective. In *Bristow v. Miller*, Crampton J., said: "*Kilgorn v. Finlyson* (4) is a clear authority to show that after a partnership is dissolved one of the late firm cannot by his act or admission involve his copartner in any new legal liability. In that case one partner had upon a dissolution been appointed to liquidate the debts of the partnership, but it was held that any acknowledgment of debt by him would not affect the other partner. The acknowledgment was referred to the new capacity of the partner as manager to wind up the concern." It does not appear that the £300 was in fact paid out of partnership assets collected by Benjamin. Indeed, I think it is to be inferred from paragraph 11 of the bill, from the banking book of Benjamin (which was produced), and from what appears in the deeds as to the sources from which payments had been made, that it was not. At all events, the plaintiff has not proved that it was so paid. I do not say that, had he proved so, this would have sustained his bill.

It was attempted to get rid of the effect of the Statutes of Limitation by saying that they do not apply to cases like the present, there being, it is said, a fiduciary relation amounting to a trust. *Burdick v. Garrick* (5) was cited as to this, but that case, I think, depended on the special nature of the deed under which moneys were to be received

(1) 3 Drew., 628.

(2) 11 Ir. L. Rep., 461.

(3) 8 E. & B., 778.

(4) 1 H. B., 155.

(5) Law Rep., 5 Ch., 233.

and invested, and the case of *In re Hindmarsh* (1) is an authority that the relation of trustee and *cestui que trust* does not ordinarily exist between solicitor and client, although the solicitor may have received moneys from or for the client.

It was further attempted to get rid of the statute by saying that William had given an acknowledgment of the debt which would take the case out of the statute. This alleged acknowledgment was contained in a letter written to his [732] solicitor for the purpose of *being, as is alleged, communicated to the testator, and which it is said was so communicated. I consider that the letter, whether it be read alone or in conjunction with the evidence as to it, was not sent to the solicitor for the alleged purpose, and that this contention fails.

It is unnecessary for me, having regard to what I have already said, to consider the further contention of William's counsel, that if the £300 should be deemed to be his payment, certain other sums paid by Benjamin to the testator, which, it was said, appear, or at all events upon an account being taken would, it was said, appear, to be more than the amount of the plaintiff's claim, should also, especially having regard to Benjamin's obligations under the dissolution deed, be considered to be payments on account of the partnership debt; nor whether, as was contended by the plaintiff, such other sums were in fact paid, or if in fact paid, should, under the circumstances, be deemed to have been paid in respect of new dealings and transactions between Benjamin and the testator, leaving the partnership debt unsatisfied except to the extent of the £300.

Nor is it necessary for me to consider whether, as was contended on behalf of William, the testator accepted Benjamin as his sole debtor, and thus released William.

On the whole, I consider that the plaintiff has not made out his case, and that the bill must be dismissed with costs as regards William Woodman and Edward Thomas Row, who is a formal party as executor of the testator.

Solicitors: Messrs. *Gregory, Rowcliffes & Rawle*; Mr. *Evans*; Messrs. *E. Flux & Leadbitter*.

(1) Dr. & Sm., 129.

By some of the courts mere payment by one joint debtor before the statute of limitations has attached has been held not to prevent the statute of limitations from running in favor of his co-debtor: *Shoemaker v. Benedict*, 11 N. Y., 176; *Barger v. Durwin*, 22 Barb., 68; *Payne*

v. Slate, 39 Barb., 639; *Bell v. Morrison*, 1 Peters, 351, 367-374; *Haner v. Hair*, 25 Ohio St. R., 349; *Merritt v. Pollys*, 16 B. Monr. (Ky.), 357; *Creighton v. Allen*, 26 Upper Can. Q. B., 627; *Lowther v. Chappel*, 8 Ala., 353; *Myatts v. Moore*, 41 Ala., 222; *Yandes v. Lefavor*,

2 Blackford (Ind.), 371; Bibb v. Peyton, 19 Miss. (11 S. & M.), 275; Fonte v. Bacon, 24 Miss., 156; Briscoe v. Aukellett, 28 Miss., 361; Day v. Baldwin, 34 Iowa, 380, 384, explaining Hendershott v. Ping, 24 Iowa, 134; Sigler v. Platt, 16 Mich., 206; Levy v. Cadet, 17 Serg. & Rawle, 126; Helm v. Cantrell, 59 Ills., 524; Stowers v. Blackburn, 21 La. Ann., 127.

But see Cockfield v. Farley, Id., 521; Voorhies' Case, Id., 659.

So after the statute had run: Van Keuren v. Parmelee, 2 N. Y., 523.

What was said in Hopkins v. Banks, 7 Cow., 650; Smith v. Ludlow, 6 Johns., 267; Johnson v. Beardslee, 15 Johns., 3; Patterson v. Choate, 7 Wend., 441, upon these points is not law in New York.

Though where one joint debtor requests the creditor to call upon the other for payment, a payment made by the latter will prevent the statute from running in favor of the debtor making such request. So of any case where there has been a recognition of the agency of the joint contractor making the payment, by his associate: Winchell v. Bowman, 21 Barb., 448, 18 N. Y., 558; Munro v. Potter, 34 Barb., 358.

Assent to and approval of a payment after it is made is sufficient to bind the party so approving: Huntington v. Ballou, 2 Lansing, 120; Com. Bank v. Warren, 15 N. Y., 577; Pitts v. Hunt, 6 Lansing, 146; First Nat. Bank v. Ballou, 49 N. Y., 155.

So if a surety makes a payment, though from the proceeds of a sale of property pledged to him by the principal to indemnify him against loss by becoming a surety, particularly if he do not disclose the fact that he paid the money as agent for the principal: Holmes v. Durell, 51 Maine, 201; Taintor v. Winter, 53 Maine, 348.

It may be doubted whether Cockrill v. Sparkes, 1 Hurl. & Colt., 699, can be sustained upon principle.

Otherwise, where one partner merely consents, after dissolution, that the other partner shall make a separate composition with creditors on his own behalf: Sigler v. Platt, 16 Mich., 206.

Or, where a third person without authority from the debtor makes a payment in his behalf: Smith v. Coons, 22 La. Ann., 445.

Part payment by an executor, by the assignee of an insolvent, etc., is not evidence of a new promise by the debtor to take the claim out of the statute of limitations: Smart v. Foster, 18 Abb. Pr., 305; Pickett v. King, 34 Barb., 193; McLaren v. McMartin, 36 N. Y., 88, 92; Harper v. Farley, 53 N. Y., 442; Smith v. Irwin, 37 Missouri, 169, as explained in McClurg v. Howard, 45 Mo., 368.

But see Trustees, etc., v. Foster, 28 How Pr., 273.

Action on a note made by defendant and one Lyndsay, payable to Jonathan Cowing and by him indorsed to plaintiff, due in July, 1859. Plea, statute of limitations. To take the case out of the statute plaintiff proved that one Thomas Cowing owing defendant \$30, got an order, with defendant's assent, from Jonathan Cowing, who then held the note, on Lyndsay, requesting Lyndsay to pay defendant \$30, which he, Jonathan Cowing, would credit on the note; and this sum was accordingly so paid and credited. Held, clearly, a payment by Lyndsay on his own account, and not by or for defendant, so as to take the case out of the statute as against defendant: Cowing v. Vincent, 29 Upper Can. Q. B., 427.

This case seems to have gone on the provisions of the statute of Canada, that "where there are two or more joint contractors * * no such joint contractor * * shall lose the benefit of said act (21 Jac. I.), so as to be chargeable by reason of any payment of any principal or interest made by any other or others of them," the court holding the payment to be one by Lyndsay, *on his own account*, and citing Jackson v. Woolley, 8 EM. & BL., 778, 92 Eng. Com. Law Rep., to sustain the ruling.

It amounted in fact to a payment by one joint debtor to the creditor, of a debt he owed the other joint debtor by direction of the latter. The court held, in effect, that as he was bound to pay his debt, *he* was not affected by doing so to such person as was named by his creditor, though that person happened to be a joint creditor and the payment was applied, to his knowledge, upon the joint debt, the court saying, "The utmost that can be argued against this defendant is, that he was aware Lyndsay was paying on his own behalf to

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Jonathan money which he, Lyndsay, was bound to pay, and that he assented in his own mind to the payment; but I see nothing to warrant me in holding that Lyndsay was paying money on the joint account of himself and defendant, or on the separate account of the latter, or *by his authority*. All the connection the defendant had with the transaction was receiving payment of a debt due by Thomas Cowing to him in the way mentioned, not that *he* was paying any money to the holder of this note."

In **New Jersey** it is held that a payment of interest on a note drawn by a firm, by one of the members, after the dissolution of the firm, but within six years after the maturity of such note, will renew it, as against the statute of limitations, and that the fact that one of the firm is a married woman will not alter the effect of such renewal: *Merritt v. Day*, 38 New Jersey Law Rep., 32.

So in **Connecticut**: *Brown v. Lathrop*, 4 Conn., 336; *Coit v. Tracy*, 8 Conn., 276; *Clarke v. Sigorney*, 17 Conn., 516; *Caldwell v. Sigorney*, 19 Conn., 44; *Austen v. Bostwick*, 9 Conn., 501; *Beardsley v. Hall*, 36 Conn., 270; *Bissell v. Adams*, 35 Conn., 299.

So in **Maine**: *Shepley v. Waterhouse*, 22 Maine, 497; *Dinsmore v. Dinsmore*, 21 Maine, 433.

But see *Gardner v. Nutting*, 5 Greenl., 140; otherwise now by statute: *Odell v. Dana*, 33 Maine, 182; *Wellman v. Southard*, 30 Maine, 425; *True v. Andrews*, 35 Maine 183.

In **Vermont**: *Wheelock v. Doolittle*, 18 Verm., 440; *Joslyn v. Smith*, 13 Verm., 353.

See *Phelps v. Stewart*, 12 Verm., 256; *Sanderson v. Milton*, 18 Verm., 107.

In **North Carolina**: *McIntire v. Oliver*, 2 Hawkes, 209.

In **Arkansas**, before statute attaches: *Trustees, etc., v. Hartfield*, 5 Ark., 551; *Burr v. Williams*, 20 Ark., 189.

Though not after: *Biscoe v. Jenkins*, 10 Ark., 108; *Biscoe v. James*, Id., 163; *Durrett v. Trammell*, 11 Ark., 187; *Grant v. Ashley*, 12 Ark., 764; *Mason v. Howell*, 14 Ark., 201; *Ruddell v. Folsom*, 14 Ark., 217; *Hicks v. Lusk*, 19 Ark., 693; *Woody v. State Bank*, 12 Ark., 780.

So in **Massachusetts**, where the stat-

ute merely raises a presumption of payment from lapse of time, payment or acknowledgment by the principal debtor was held to continue the debt as against a surety: *Hunt v. Bridgham*, 2 Pick., 581, and cases cited in note; *Vinal v. Burril*, 16 Pick., 401; *Sigorney v. Drury*, 14 Pick., 387; *White v. Hall*, 3 Pick., 291; *Cady v. Shepherd*, 11 Pick., 400, 407, and cases cited.

A statute to the contrary has since been passed: *Revised Statutes Mass.*, ch. 120, § 14.

In **Missouri** it has been held that part payment of a firm debt by one partner, after dissolution, before the statute had run, will take the debt out of the statute as to the other partner: *McClurg v. Howard*, 45 Missouri, 365; *Lawrence Co. v. Dunkel*, 35 Missouri, 95; *Craige v. Callaway Co.*, 12 Mo., 94; *Block v. Dorinan*, 51 Mo., 31.

So in **Oregon**: *Sutherland v. Roberts*, 4 Oregon, 378.

In **Georgia** the cases present a somewhat variegated aspect. It is held that payment or acknowledgment by one joint obligor *before* the statute attaches prevents the statute attaching in favor of a co-obligor: *Cox v. Bailey*, 9 Geo., 467; *Tillinghast v. House*, 14 Geo., 641, 647, decided upon the doctrine of *stare decisis*, though doubting correctness of the rule: *Brewster v. Hardeman*, *Dudley*, 138.

But that payment by a *principal* or *maker* of a promissory note before it is barred by the statute, does not constitute a new point for the running of the statute of limitations as against an indorser or surety, unless the indorser or surety be a party to such payment: *Hunter v. Robertson*, 30 Geo., 429; *Dean v. Munroe*, 32 Geo., 28.

In **New Hampshire** it is held that payment by one *partner*, the creditor having no notice of a dissolution, will continue the debt as to the other partner: *Kenniston v. Avery*, 16 N. H., 117; *Tappan v. Kimball*, 30 N. H., 136.

But that a partial payment of a note, by one of two joint promissors (not being partners), is not sufficient to take the case out of the operation of the statute as to the other: *Whipple v. Sterns*, 22 N. H., 219; *Exter Bank v. Sullivan*, 6 N. H., 124; *Kelly v. Sanborn*, 9 N. H., 40.

[Law Reports, 20 Equity Cases, 733.]

C.J.B., May 24; June 7, 1875.

**Ex parte ROBERTSON. In re MORTON.* [733]

Bankruptcy—Jurisdiction—Foreign Creditor resident Abroad—Effect of Proving Debt—Notice of Motion—Service out of Jurisdiction—Waiver of Irregularity—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 2, 72–76—Bankruptcy Rules, 1870, r. 50.

A foreign creditor, residing out of the jurisdiction of the Court of Bankruptcy, by proving a debt in a bankruptcy or liquidation, brings himself within the general jurisdiction of the court as to the administration of the estate, just as if he were residing within it. An order can therefore be made on him to restore property of the bankrupt or debtor improperly in his possession.

A notice of motion was served out of the jurisdiction on the respondent. No order authorizing the service had been obtained from the court. The respondent appeared on the hearing of the motion, and objected to the jurisdiction of the court. On his objection being overruled, he asked for and obtained an adjournment to enable him to answer the case on its merits:

Held, that there had been a mere irregularity in the service, and that it had been waived.

THIS was an appeal from a decision of the judge of the Newcastle-on-Tyne County Court.

William Morton and Edmund Morton, potato merchants at Newcastle, filed a liquidation petition on the 18th of February, 1874, and the same day a receiver and manager of their property and business was appointed. At the first meeting of the creditors, on the 13th of March, 1874, the creditors resolved on a liquidation by arrangement, and appointed J. B. Benson and J. Greener trustees of the debtors' property.

The debtors had been in the habit of purchasing potatoes from Donald Robertson, a potato merchant, who resided at Mayfield, in the parish of Cupar, in Scotland, and was a domiciled Scotchman. He had no residence or place of abode in England. On the 17th of February, 1874, the debtors owed him £367 2s. 11d. for potatoes, and they sent him by post a check for £120, drawn upon Messrs. Lambton & Co., bankers at Newcastle. He received this check on the 18th of February, and paid it to his bankers, by whom it was sent the same day back to Newcastle, and it was on the 19th of February honored by Lambton & Co., who were then ignorant of the filing of the liquidation petition.

*Robertson proved in the liquidation for £247 2s. [734 11d., the balance remaining due to him after giving credit for the £120; the proof was admitted by the trustees, and on the 27th of October, 1874, they paid him a dividend of 4s. 6d. in the pound.

The above-mentioned facts afterwards came to the knowledge of the trustees, and on the 6th of March, 1875, Robert-

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son was served at Mayfield with a notice of motion on their behalf, stating that an application would be made to the County Court on the 12th of March for an order that he should repay the £120 to the trustees. No order for service on him had been made. On the 12th of March, Mr. Philipson, a solicitor at Newcastle, appeared on behalf of Robertson, and objected that the court had no jurisdiction over him. The judge overruled the objection, and Mr. Philipson then asked for an adjournment, on the ground that he was not then prepared to go into the merits of the case. The judge granted an adjournment for a month, on the terms of Robertson paying £100 into court within a fortnight, and also paying the costs of the adjournment. On the subsequent hearing of the motion on the 23d of April, counsel appeared for Robertson, and took the objection as to the jurisdiction. The judge overruled it, and Robertson's counsel withdrew before the evidence on the merits of the case was heard. Robertson had filed an affidavit in which he took the objection of want of jurisdiction, on the ground that he was a domiciled Scotchman, having no residence in England, and also deposed to facts bearing on the merits of the case. The judge made an order in the terms of the notice of motion. Robertson appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the appellant: An English court of bankruptcy has no jurisdiction over a domiciled Scotchman resident in Scotland. If this had not been a case of bankruptcy, no action could have been brought in an English court against the appellant to recover this money; he must have been sued in Scotland. 735] Sects. 66 and 72⁽¹⁾ of the *Bankruptcy Act, 1869, do not give the Court of Bankruptcy a jurisdiction larger than that of the Court of Chancery or one of the superior courts of common law.

(1) Sect. 65 provides that "the Chief Judge in Bankruptcy shall have all the powers, jurisdiction, and privileges possessed by any judge of Her Majesty's superior courts of common law at Westminster, or by any judge of Her Majesty's High Court of Chancery, and the orders of such judge shall be of the same force as if they were judgments in the superior courts of common law, or decrees in the High Court of Chancery."

Sect. 66. "Every judge of a local court of bankruptcy shall, for the purposes of this act, in addition to his ordinary powers as a County Court judge, have all the powers and jurisdiction of a judge of Her

Majesty's High Court of Chancery, and the orders of such judge may be enforced accordingly in manner prescribed."

Sect. 72 provides that, "Subject to the provisions of this act, every court having jurisdiction in bankruptcy under this act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case."

Moreover, the notice of motion was not effectually served on the appellant. In *Ex parte O'Loghlen* (¹) it was held that a debtor's summons could not be served out of the jurisdiction, there being no power given by the act or the rules to effect a service there, and that such a service, though made under an express order of the court, was a nullity. This applies equally to service of a notice of motion under rule 50 of the Bankruptcy Rules, 1870 (²), for no power is given to serve the notice out of the jurisdiction, and the shortness of the interval allowed for service shows that the rule could not have contemplated service out of the jurisdiction.

[They were stopped by the court.]

Mr. *Little*, Q.C., and Mr. *Colt*, for the trustees: The appellant having proved and received a dividend, the court has complete jurisdiction under sect. 72 to compel him to refund any part of the debtor's estate which is improperly in his hands. Sect. 74 of the act enables the Scotch courts, which have jurisdiction in bankruptcy, to enforce in Scotland orders made by the English bankruptcy courts, and sect. 75 makes the English and Scotch bankruptcy courts auxiliary to each other. The order in this case was rightly made by the English court, but it must be *enforced [736 by the Scotch court. In *Ex parte Tait* (³) it was held that the court had jurisdiction to restrain a creditor from suing in Ireland in respect of a debt included in a deed which the debtor had executed under the Bankruptcy Act, 1861. Under the old bankruptcy law it was held that a creditor who had proved was subject to the jurisdiction of the court in respect of his proof: *Ex parte Hilton* (⁴). As to the service of the notice of motion, there has been nothing more than an irregularity, which has been waived by the appellant's asking for time to answer the case on its merits, and filing an affidavit upon the merits. *Ex parte O'Loghlen* (¹) does not apply.

Mr. *De Gex* in reply: The service out of the jurisdiction was, as is shown by the *ratio decidendi* of *Ex parte O'Loghlen*, a complete nullity—not a mere irregularity which could be waived. As to the jurisdiction, my argument is that this proceeding is equivalent to the bringing of any action for money had and received in an English court against a domiciled Scotchman resident in Scotland. That cannot be

(¹) Law Rep., 6 Ch., 406.

(²) Rule 50 provides that a notice of motion must be "served upon the party or parties to be affected thereby four clear days at least before the day named in

such notice as the day when the motion is to be made."

(³) Law Rep., 13 Eq., 311.

(⁴) 1 Jac. & W., 467.

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done. *Davis v. Park* (') and *Cookney v. Anderson* (') show very clearly what are the principles which govern the territorial jurisdiction of courts. Sect. 72 of the act gives the Court of Bankruptcy no higher jurisdiction than that of the Court of Chancery or the courts of common law. *Ex parte Tait* does not apply. Proof of debt does not amount to a complete submission to the jurisdiction of the court. *Ex parte Hilton* only shows that the dividend on the debt proved for may be retained, or that a dividend paid may be recalled. It is no authority for saying that the court has jurisdiction to order a creditor who has proved, to repay some other fund which he has received from the debtor. *Ex parte Dobson* (') shows that the court formerly had no such power, and I say that sect. 72 does not confer it.

SIR JAMES BACON, C.J.: Two objections have been taken [737] to this order. The first and *larger one is that the court has no jurisdiction to make such an order against the appellant because he is a domiciled Scotchman. The second is that the court has proceeded erroneously in making the order, even if it had a right in other respects to make it, because there had been no proper service of the notice of motion. The two questions are totally distinct from each other, the first, the larger and more important one, being whether, under the existing act of Parliament and the existing practice of the Bankruptcy Court, the court at Newcastle had power to make an order directing the appellant to pay back the £120, part of the debtors' estate, which he had received. Now, that is a question, no doubt, of very great importance. Every question, indeed, of jurisdiction is of vital importance. The question can be decided only by an inspection of the existing act of Parliament. That there was a valid bankruptcy, or an arrangement which is equivalent to bankruptcy, prosecuted in the proper court, is not questioned in the slightest degree. Then the 72d section of the act provides: [His Lordship read the section.]

Now let us inquire, first, whether the subject-matter of this application comes within those words. It is not disputed that on the 18th of February an act of bankruptcy was committed, and after that the appellant possesses himself, not unnaturally or wrongfully in any other way than a legal sense, of £120, part of the debtor's estate. The law is that, from the appointment of the trustee in a liquidation, he shall have all the powers and rights of a trustee in bankruptcy, and therefore, on the 18th of February, and before the receipt by the appellant of the £120, the whole of the

(') 42 L. J. (Ch.), 204, 208.

(') 1 D. J. & S., 365.

(') 1 Mont. & A., 666.

debtors' estate, including that sum, which was part of the debtors' estate before it was received by the appellant, was vested in the trustee. The appellant came in under the liquidation proceedings. He made an affidavit, which stated that a certain debt was due to him at the institution of the proceedings, and that it was still justly due and owing. In stating that amount he gave credit to the debtors' estate for the £120, not in terms, but it appears by the result that he excluded it from his proof of debt. He came in under the liquidation, and what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had *signed and sealed and sworn to the terms of it—that [738 the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt's estate. Can there be any doubt that the court had jurisdiction to get back that £120? I am not touching upon the merits of the case, nor am I expressing any opinion upon them; but can there be any doubt that the appellant in this case has agreed that, as far as he is concerned, and as far as the whole of the creditors proving are concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit, and is entitled as much as any other creditor, though not more than any other creditor, to insist on the due distribution of the whole of the debtors' estate?

It is said that this court, being an English court, has no jurisdiction over this gentleman who has entered into this, which I call a compact, who has come in under it, and has been a party to the administration of the estate in the manner I have mentioned, because he lives on the other side of the border. I am of opinion that there is no ground whatever for that, and I think that he is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England.

The other objection is, that there has not been due service of the notice of the motion by which the appellant was called upon to account for that £120. It is quite true, as I understand the case, that the service was very defective in point of regularity; but that the notice was actually brought

to his attention is not only stated in the affidavit, but in point of fact, on the very day when the notice of motion was to be heard, the day on which it was returnable, as it is called, he, by his attorney, came into court and raised his objection that the court had no jurisdiction. The objection as to irregularity was waived.

What would have happened if it had been taken? Phil-739] ipson *comes into court and says, You cannot do anything, for two reasons. One of them is, that you have no jurisdiction; and the other is, that the notice with which my client has been served is not a good one. In that case the learned judge below would have said, I will make no order upon this notice of motion, but I will allow it to stand over in order that the four days' notice may be properly given. But, in fact, the appellant comes in and says, You have no jurisdiction; and, besides that, I want time to answer; and asks for further time, when he finds that the judge is not with him on the subject of jurisdiction. The learned judge accedes to this request for further time, and does allow the matter to stand over till another day on certain terms. He gave the appellant time to answer the summons which had been confessedly served upon him, although served irregularly. The adjournment took place as a matter of course, and when the day which had been fixed for the adjourned hearing arrived there was an affidavit by him going into the merits of the case. It was stated in this affidavit that he was a domiciled Scotchman, and he submitted that the court had no jurisdiction over him. Upon every rule of practice that was a perfect and complete waiver of the technical objection that there had been an inadequate service.

When *Ex parte O' Loughlen* ⁽¹⁾ was referred to I told Mr. De Gex that I did not agree that the *ratio decidendi* there given was in his favor. The interlocutory proceeding in that case, that is, the service of the debtor's summons, the disobedience to which constitutes an act of bankruptcy, was of the very greatest consequence, and the question raised before the court was, not whether there had been a due service of the summons, because there was no question that the debtor had been served, and there was no irregularity in the service, but a want of legal efficacy was suggested. I cannot come to the conclusion that on the facts Sir Coleman O' Loughlen was amenable to the English process in bankruptcy—the act having expressly said that it should not apply to Scotland or Ireland—merely because he was out of Ireland by accident, and had been served in England, being

(1) Law Rep., 6 Ch., 406.

a member of Parliament resident in London, for the purpose of discharging his parliamentary duties, *where [740 they took an opportunity of serving him. But that was no ground for deciding that the court had jurisdiction to order service of the summons.

I do not agree with Mr. De Gex that the *ratio decidendi* there was that the service had been wrong. Lord Justice Mellish, in the course of his observations, directs himself to the particular proceeding before him, which was the service of a debtor's summons. It is impossible to read his judgment in any other light, and the court accordingly decided that Sir Coleman O'Loughlen was a person not under any circumstances subject to the jurisdiction of the court, and therefore that the court could have no jurisdiction over him. Well, then, what am I to do with respect to this, this being really the point of the case? I find that there was an irregular service of the notice of motion on a man out of the jurisdiction. I find that that man came in with the notice of motion in his hand (as I must assume), and said, This notice has been served on me. I am subject to the laws of Scotland. You, as an English judge, have nothing to do with me; and then the judge disagrees with him, and tells him that he has. Thereupon his solicitor asks for time, that he may address himself to the merits of the case. That was a waiver of the mere irregularity in form, and there was not an irregularity in substance, as in the case of Sir Coleman O'Loughlen. There it was substance, here it was an irregularity of form merely; and it is the practice in this court, beyond all question, and the practice of every other court, in all cases to cure irregularity by accepting the waiver of the person affected by it. What is the real gist and reason of this rule which requires a four days' notice of motion? It is that the person who is to be affected by it shall have time to set himself right, and to file his affidavits. He is not to be compelled to come into court on a shorter notice than four days, nor even then if he can make out any ground for extending the time. The case of *Ex parte Hilton* (*) was plain enough according to the law as it then stood. There was no 72d section then, and no law by which the court could compel the delivery up of property of a bankrupt held by a creditor. The case is different now, because the 72d section supplies the defect, and makes it *un- [741 necessary to bring an action, as in *Ex parte Dobson* (*). No necessity exists for it now, for a wiser provision has been made. In my opinion it is wiser and more consistent with

(*) 1 Jac. & W., 467.

(*) 1 Mont. & A., 666.

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justice that the law should enable the Court of Bankruptcy to exercise, I was going to say unlimited, jurisdiction over every man who claims the benefit of the process of the court and who has obtained it, and who has, therefore, in the most formal and explicit manner, subjected himself to the jurisdiction of the court. I think, therefore, that the judgment of the court below cannot be assailed on either of the two grounds I have mentioned.

I am much obliged to Mr. De Gex for reading the judgment in *Cookney v. Anderson*⁽¹⁾, for it is very pleasant to hear so lucid an explanation of the law, conveyed in such choice terms as those in which Lord Westbury expressed himself. But if you look at that case closely you will find that it is less favorable to the argument than the general scope of the reasoning seemed to be. You will find that Lord Westbury limits what he says to the case of a party who does not appear, or who is absent from the jurisdiction. But I have to deal with a case in which he plainly did appear.

It was directed that the case should be remitted to the County Court to be decided upon the merits, with a declaration that that court had jurisdiction in the matter.

Solicitors for the appellant: Messrs. *Williamson, Hill & Co.*, agents for Mr. *J. A. Philipson, Newcastle-on-Tyne*.

Solicitor for the trustee: Mr. *G. B. Wheeler*, agent for Mr. *H. S. Sewell, Newcastle-on-Tyne*.

(¹) 1 D. J. & S., 365.

Process to *confer jurisdiction* cannot be served abroad except pursuant to some statute or other authority: *Dunn v. Dunn*, 4 Paige, 425; *Johnson v. Nagle*, 1 Molloy, 240, disapproving *Nichol v. Gwyn*, 1 Sim., 389; *Hawkins v. Hale*, 1 Beav., 73.

See *Murray v. Vissart*, 1 Phillips' Chy., 521, and note to *Banks & Co.*'s edition.

An action is *pending* in a court though judgment has been recovered therein, as long as such judgment remains unsatisfied: *Wegman v. Childs*, 41 N.Y., 159; *Sherman v. Felt*, 2 N.Y., 186, 3 How Pr., 425; *Howell v. Bowers*, 2 Cromp., Mees. & Rosc., 621.

When the party is a non-resident or cannot be found, service of a notice of motion to set aside a judgment on his attorney four years after the entry of judgment was held sufficient: *Drury*

v. Russell, 27 How Prac., 130; *Pitt v. Davison*, 37 N. Y., 242, 3 Abb., N.S., 405-6.

Where the court has obtained jurisdiction of a party by the service of proper process or by appearance, it is a matter of practice whether any and what notice shall be given to him of any subsequent proceedings in the cause. An order made without notice is not *void*: *Suydam v. Holden*, Selden's Notes, Court Appeals, October, 1853, p. 16; *Wegman v. Childs*, 41 N. Y., 159; *Johnson v. Nagle*, 1 Molloy, 240, disapproving *Nichol v. Gwyn*, 1 Sim., 389.

See *Cameron v. Cameron*, 2 Myl. & Keene, 289; *Parker v. Lloyd*, 5 Simons, 508.

A person out of the state is, unless otherwise provided, to be considered, after jurisdiction once obtained, as not

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to be found: *Matter of Williams, Col. & Caines' Cas.*, 114.

Where the party is a non-resident, special directions must be given as to the manner of service of the order, if any notice thereof shall be deemed requisite: *Knickerbocker v. Defreest*, 2 Paige, 304, 306.

A defendant to a bill of revivor had appeared to the original bill by his solicitor, but before the filing of the bill of revivor had gone out of the jurisdiction. The court ordered, that service of the subpoena to appear, on the solicitor, should be good service on the defendant: *Norton v. Hepworth*, 1 Macnaghten & Gordon, 54, 1 Hall & Twells, 158; *Wallis v. Darby*, 6 Hare, 618; *Hart v. Tulk*, 6 Hare, 611; *Forster v.*

Menzies, 16 Beav., 568; *Scott v. Wheeler*, 13 Beav., 239, 1 Dan. Ch. Pr. (4th Am. ed.), 447-8, 454.

So upon an agent of the party: *Bligh v. Tredgett*, 5 De Gex & Smale, 74; *Forster v. Menzies*, 16 Beav., 568; *Murray v. Vissart*, 1 Phillips, 521, and note to *Banks & Co.'s ed.*

But see *Carson Iron, etc., v. Maclaren*, 5 House Lords' Cas., 417.

Service of notice of motion, after jurisdiction is obtained, may, by leave of the court, be made beyond its jurisdiction: *Davidson v. Marchioness of Hastings*, 2 Keene, 509; *Hawkins v. Hall*, 1 Beav., 75, 1 Sim., 390, note 1.

"In any part of the world:" *Anon.*, 1 Hogan, 1; *Nolan v. Nolan*, 1 Hogan, note.

[Law Reports, 20 Equity Cases, 746.]

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**Ex parte* HODGKIN. *In re* SOFTLEY. [746

Fraudulent Preference—Act of Bankruptcy—Security given in fulfilment of prior Voluntary Promise—Equitable Mortgage of unfinished Ship—Deposit of Builder's Certificate—Consolidation of Mortgages—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 6 (subs. 2), 92.

In August S., a shipbuilder, whose account current with his bankers was overdrawn, offered to give them security upon a ship which he was building. The bankers declined to accept the security then, but said that circumstances might arise to make it desirable that they should have it, and he promised to give it them when they wished it. On the 28th of September the offer was renewed, but the bankers urged him to sell the ship, and so prevent the necessity of their taking the security. On the 7th of October S. had an interview with them at the bank, and they told him that they would accept the security, and that he was to lodge the builder's certificate of the ship with their manager. The next day he signed the certificate, and gave it to the bank manager. The certificate described the ship and her engines, and stated that she had been built for the bank manager. At this time she was not launched, but was in an unfinished state in the builder's yard. The engines were not on board, but were lying unfinished in the yard of the firm who were making them for the shipbuilder. On the 9th of October the shipbuilder had another interview with the bankers, when they told him they could advance him no more money, and did not see how he could go on, to which he assented; but they agreed to advance him £770 to pay his workmen's weekly wages, on the security of an assignment of a debt owing to him from another person, and told him that they could go no further, and that he had better consult his solicitor as to his position. On the 10th of October the manager endeavored to get himself registered as the owner of the ship, but, as she was not launched, this could not be done. But he placed a man in possession of her, and fixed a notice upon her that she was his property. On the 10th of October S. paid his workmen, and then discharged them, and closed his place of business. On the 12th of October he filed a liquidation petition:

Held, that both the securities given to the bankers were valid as against the trustee in the liquidation, there not being in the transactions anything amounting to either a fraudulent preference or an act of bankruptcy:

Held, also, that the deposit of the builder's certificate created a good equitable mortgage of the unfinished ship, including the engines which were being built for

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her, but subject as to the engines to any lien for unpaid purchase-money to which the engine-builders might be entitled :

Held, also, that the assignment of the debt having been given after the insolvent position of S. was disclosed, was a security for the £770 only, and could not be made available by consolidation or otherwise to secure the past debt.

THIS was an appeal from a decision of the judge of the Newcastle-on-Tyne County Court.

747] *John Softley was a shipbuilder at South Shields. He kept an account current with Messrs. Hodgkin, Barnett & Co., bankers, of Newcastle, at their branch bank at South Shields. The bankers made him advances from time to time by allowing him to overdraw his account. In order to obtain these advances, he was in the habit of showing to the bankers at the commencement of every month an account of the sums which he should have to pay and the sums which he expected to receive during the month.

From the evidence of Mr. Robert Spence, one of the partners in the banking firm, it appeared that, on the 31st of August, 1874, Softley's account being then overdrawn to the extent of £7,500, the bankers had an interview with him at their bank in Newcastle. He offered them security upon a ship called No. 111, which he was then building in his yard, but, as the account which he then produced of his probable receipts and payments during the next month showed that he was perfectly able to meet his engagements, they declined to accept the offered security then, but they told him that circumstances might arise which might make it desirable for them to have it, and he agreed to let them have it at any time thereafter, if they should desire it. At this interview Softley also stated that a Mr. Avery owed him £11,000, and the bankers pressed him to get bills from Avery for this amount, and early in September Softley succeeded in getting bills from Avery to the extent of £6,000, part of the debt. On the 28th of September Softley's son called on the bankers at their bank in Newcastle, and told them that Avery would pay £6,000 to his father on the 22d of October, and that ship No. 111 would be launched on the 30th of September. He said that several persons were in treaty for her, but that if none of them came to terms, Avery would purchase her for £9,000. The son offered the bankers security upon No. 111, but they urged him to sell her, and so to prevent the necessity of their taking security. On the 7th of October the bankers had another interview with Softley, at their bank in Newcastle, and he submitted to them a statement of his probable receipts and payments. As his overdraft was continuing, and the ship No. 111 was not sold, they told him that they would accept the security

before offered upon that ship, and that he was to lodge the builder's certificate of the ship with Mr. Scott, the *manager of the branch bank at South Shields. The [748 bankers also instructed Mr. Scott to take the necessary steps to get himself registered at the Custom House as the owner of the ship. On the 8th of October Softley lodged the builder's certificate of the ship with the bankers. This document was dated the 8th of October, and it specified the particulars of the ship and her engines, as required by the Merchant Shipping Act, 1854, and it certified that Softley had built the ship for and on behalf of Mr. Scott. At this time the ship was still on the building slip; her hull was incomplete, she had no masts, and her engines were not on board. The engines were in fact unfinished, and were in the possession of a firm of Marshall, Osborne & Co., who were constructing them under a contract with Softley. On the 10th of October, 1874, Scott signed a declaration of ownership of the ship, as required by the Merchant Shipping Act, 1854, with the view of getting himself registered as the owner. As, however, the ship was not afloat, no registration could be effected. But on the 10th of October Scott placed a man in possession of the ship in Softley's yard, and a board was put upon her stating "This ship is the property of Thomas Scott, bank agent." On the 9th of October the bankers had another interview with Softley at their bank in Newcastle. He then produced a statement of his probable receipts and payments for October, from which it appeared that the debt due to him from Avery was considerably less than he had at first represented it to be, and that it did not, in fact, after allowing for the bills which Avery had given, amount to more than £2,300. At this interview, also, Softley for the first time told the bankers that the engines were not in the ship, although they were mentioned in the builder's certificate, but that they were in Marshall, Osborne & Co.'s yard. The bankers then told Softley that they could not continue their advances to him. Softley urged them to do so, and they agreed to advance him £770 to enable him to pay the week's wages due the next day (a Saturday) to his workmen, upon his giving them as security an assignment of the debt to him from Avery, but they told him that they could not go further, and that he had better consult his solicitor as to his position and the prospect of his continuing his business. Softley agreed to assign Avery's debt to the bankers, and gave *them a letter to that [749 effect, and the same day he executed a formal assignment of the debt, of which the bankers gave notice to Avery. On

the 10th of October Softley paid his workmen their week's wages, and discharged them. He closed his yard, and did not open it again; and on the 12th of October, he filed a liquidation petition, under which Mr. Winter was appointed trustee. The bankers denied that they knew that Softley was in insolvent circumstances until their interview with him on the 9th of October.

Softley was examined, and his evidence in the main confirmed the statements of Mr. Spence. Softley also stated that about the beginning of September, 1874, there was a report in the town that he was insolvent, and that two or three of his creditors came to him to ask him about it. He referred them to the bankers, with the authority of the latter, and the result was that the creditors continued to supply him with goods. He also stated, with regard to his interview with the bankers on the 7th of October, that they then told him he must lodge the builder's certificate of the ship with Mr. Scott. He said, also, that at the interview on the 9th of October, after some conversation with the partners in the bank, Mr. Scott said, "Now, Mr. Softley, we cannot see our way clear to advance you any more money after paying wages." Softley then told them that the vessel was not worth £9,000 without the engines being put in her, and that he could complete her for £350, and that if they kept him going for another month, they would increase their security. They said they would not advance any more money, and he replied, "Well, I have showed it to you."

Mr. Scott was also examined, and he stated that on the 9th of October he said to Softley, "I do not see how you are to go on," to which Softley replied, "I don't see that I can." The assignment of Avery's debt to the bankers, which was executed by Softley on the 9th of October, contained a recital that Softley, being indebted to the bankers in a considerable sum of money, had agreed to assign the debt thereinafter mentioned to them, and an absolute assignment to them of Avery's debt, which was described as amounting to £2,384. There was no proviso for redemption.

The trustees disputed the validity of both the securities, on the ground that they constituted fraudulent preferences and acts of bankruptcy. The judge made an order (declaring that the ship *No. 111, together with the engines in course of being built for her, were a security to the bankers for their advances to Softley, and that they were entitled to complete, launch, and sell the ship, and to complete and sell the engines, and to have the proceeds of sale applied in payment of their advances; and it was further declared that

the assignment to the bankers of Avery's debt was a good and valid security, and that the bankers were entitled to the benefit thereof, and to have the proceeds of the debt applied in payment of their advances to Softley. The trustee appealed.

The order appealed from was made in the absence of Marshall, Osborne & Co., but they presented an appeal from it.

Mr. *Little*, Q.C., and Mr. *Doria*, for the trustee: The giving of the security on the ship amounted to a fraudulent preference. It was not demanded by the bankers before it was thrust on them by the customer. The promise made in August to give it at a future time was a purely voluntary one, and when the security was actually given the bankers must have been well aware that Softley was hopelessly insolvent: *Ex parte Kevan* (*). The giving of the security was also an act of bankruptcy under sect. 6 (sub-sect. 2) of the Bankruptcy Act, 1869, as a fraudulent transfer of a part of the debtor's property. The postponement of the giving of the security till there was an actual state of insolvency is evidence of an intent to defraud the general creditors: *Ex parte Fisher* (*). If the transaction comes under the Bills of Sale Act, which we contend it does, as the ship was incomplete, there was an attempt to evade the provisions of the act: *Ex parte Cohen* (*). The possession taken was ineffectual, as no right had been given to the mortgagee to take any possession at all. The deposit of the builder's certificate did not amount to an equitable mortgage of the ship. The property in a ship can only be transferred under the Merchant Shipping Act of 1854 by means of registration, and that could not be effected in this case. At any rate, the engines which were not on board could not be affected. As to the assignment of Avery's debt, it is rendered void by the prior act of bankruptcy. Moreover, a security which must have the effect of stopping a trader's business cannot be maintained: *Young v. Fletcher* (*). At any rate, the assignment can only be a security for the £770, and not for the other sums due to the bankers. The order of the County Court is clearly wrong in that respect. Though the bankers swear that they did not know of the insolvency, yet they must be taken to have drawn that which was the proper inference from the facts which they did know: *Ex parte Snowball* (*).

(*) Law Rep., 9 Ch., 752.

(*) Law Rep., 7 Ch., 636.

(*) Law Rep., 7 Ch., 20.

(*) 3 H. & C., 732.

(*) Law Rep., 7 Ch., 534, 549.

Mr. *De Gex*, Q.C., and Mr. *Gainsford Bruce*, for the bankers: There was no fraudulent preference, for there was pressure. A polite request by a man's bankers, when they have him entirely at their mercy, would amount to pressure. But Softley was told that he must lodge the certificate: *Ex parte Topham* ⁽¹⁾. Moreover, a payment or transfer made in fulfilment of an obligation is not a fraudulent preference: *Bills v. Smith* ⁽²⁾. At any rate, as the bankers were ignorant of the insolvency, they are protected by the proviso in sect. 92 in favor of "incumbrancers in good faith and for valuable consideration": *Ex parte Butcher* ⁽³⁾. With regard to the supposed act of bankruptcy, *Ex parte Fisher* ⁽⁴⁾ was a case of an assignment of the whole of a bankrupt's property for a past debt, not of part only, as in the present case. That distinction makes just all the difference: *Ex parte Mackenzie* ⁽⁵⁾; *Ex parte Izard* ⁽⁶⁾. If there was an evasion of the Bills of Sale Act, that is no objection; the question is, whether the act hits the case: *Ramsden v. Lupton* ⁽⁷⁾. It is clear that a sufficient possession was taken before the liquidation petition was filed: *Ex parte Lewis* ⁽⁸⁾; *Emanuel v. Bridger* ⁽⁹⁾. So as the mortgagee had got possession, it does not signify how he got it: *Ex parte Redfern* ⁽¹⁰⁾. The deposit of the builder's certificate, taken in connection with the previous agreement to give a security on the ship No. 111, constituted a good equitable mortgage between the parties. The certificate was merely for the purpose of identification; the builder 752] *did all that he could to charge the property. No writing was necessary. As to the engines, the contract between Softley and Marshall for the building of them was similar in its terms to that for building the ship in *Ex parte Lambton* ⁽¹¹⁾, in which Lord Justice Mellish expressed an opinion that the property in the ship passed to the purchaser subject to the vendor's lien for unpaid purchase-money. *Ex parte Reed* ⁽¹²⁾ also applies. As to Avery's debt, the assignment is an absolute one, and it was intended to cover all that was due to the bankers. There is, no proviso for redemption.

Mr. *Little*, in reply: *Ex parte Fisher* ⁽⁴⁾ applies, for we show a fraudulent dealing with a part of the debtor's property.

⁽¹⁾ Law Rep., 8 Ch., 614.

⁽²⁾ 6 B. & S., 314.

⁽³⁾ Law Rep., 9 Ch., 595.

⁽⁴⁾ Law Rep., 7 Ch., 636.

⁽⁵⁾ 42 L. J. (Bkcy.), 25.

⁽⁶⁾ Law Rep., 9 Ch., 271.

⁽⁷⁾ Law Rep., 9 Q. B., 17.

⁽⁸⁾ Law Rep., 6 Ch., 626.

⁽⁹⁾ Law Rep., 9 Q. B., 286.

⁽¹⁰⁾ 19 W. R., 1058.

⁽¹¹⁾ Law Rep., 10 Ch., 405.

⁽¹²⁾ Law Rep., 14 Eq., 586.

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Mr. Winslow, Q.C., and Mr. Coll, appeared for Marshall, Osborne & Co., and claimed a lien upon the engines for unpaid purchase-money.

It was arranged that they should be heard after judgment had been given as between the other parties, their rights being reserved.

SIR JAMES BACON, C.J.: This is a case which, as I conceive, must come under the 92d section of the Bankruptcy Act, and not under the 2d sub-section of the 6th section. I think the transaction in question cannot, under any circumstances, be treated as an act of bankruptcy. It was not a transfer of the whole of the debtor's estate, and no single fact has been stated, no argument has been addressed to me which would induce me to say that it was a fraudulent transfer of a part of the debtor's estate. But whether under the 92d section there was *prima facie* a preference of the one creditor over the others is a matter which requires the utmost investigation, and that investigation has been carried on in the court below, and also in the course of the argument addressed to me.

The facts are really not in dispute. Softley, carrying on a very extensive business, having a very heavy account with his bankers, which underwent various fluctuations, being sometimes largely *overdrawn and sometimes brought [753 within much more moderate limits, keeps that account on from the year 1872 till the latter end of the year 1874. It is proved, I think, sufficiently and distinctly as a fact, that as early at least as in August, 1874, an offer was made by Softley to give the bankers a security upon the ship No. 111, to secure the money which he then owed to them, and that that offer was rejected. The only difference between Softley's statement and theirs is this, that his narrative stops at mentioning the refusal of the bankers to accept the security, whereas the affidavits on the part of the bankers go further, and say that he was told that they would not accept the security at that time, but that circumstances might arise which would induce them to call upon him to perfect the offer which he then made. Mr. Little has argued, not without some reason, that that ought to be considered as if the bankers declined to take the security because they were aware that it would be inconvenient and useless to them, and would at once endanger the credit of the debtor, and that that would be properly treated as an evasion of the Bills of Sale Act, and, in short, an attempt to bolster up the credit of the debtor and enable him to carry on his business, they having the power at any time to call upon him to give

them a security which would confer on them a preferential right over all his other creditors. But I cannot surmise that; I must deal as a jury would with the facts proved before me, and there is nothing I know of unreasonable in the conduct of the bankers, nothing that could induce me to believe they had any dishonest intention towards the other creditors. It was reasonable that they should say to this man, "Carry on your business; pay in as much as you can. We will help you as far as we can, and if the time should ever come when we should wish to have the security you have already offered us, we will call upon you to carry out that offer." What is there unlawful in that? You may surmise that it was fraudulent, but surmise is not enough. You must have some facts. There are no facts here which take the case out of the most ordinary transaction between a banker and, his customer; advances made by the banker to the customer for the purpose of carrying on his business. Nor does the circumstance that, when reports had got abroad injurious to the credit of Softley, and applications were 754] made to him for *payment which he communicated to the bankers, they said, "Send the creditors to us," and then made some statements as to his credit, affect the question. Whatever statement they made, it is not reasonable to believe that it was calculated to mislead the creditors unless it was untrue in itself. If the bankers had simply said to the creditors, "We have trusted him considerably, and we mean to trust him more; we do not think he is going to fail," there would be nothing improper in that. Nor can I perceive in the whole of the narrative any single fact on which I can with justice rest a suspicion that the bankers at any time tried to do that which the law would not allow, or which was in point of law or morals wrong or unreasonable. Then comes the transaction upon which so much has been said. On the 7th of October the bankers say, "You have promised us a security, now give it us. You have mentioned the ship No. 111; deposit the builder's certificate of that ship with us. We close your account; we will make you no further advances, and we ask now for that security which you promised to give us." Looking to the language of the 92d section, I must, in order to avoid that transaction, find that it was a voluntary act on the part of the debtor. I can readily find, and I do not hesitate to conclude, that he had not the means of paying his debts with his own moneys; but I must also find that he acted perfectly voluntarily, and with intent to prefer the bankers to his other creditors; and I must take care, moreover, that

the transaction does not fall within the proviso at the end of the section which protects the bankers, if they were incumbancers acting in good faith and for valuable consideration. Those conditions are, in my opinion, most fully performed, because I cannot see any want of good faith on the part of the bankers, nor any reason for suspecting it; and that there was a good consideration is proved.

Then it comes to this, whether the former promise is one which, according to the authorities, will sustain the subsequent transaction. The promise was plain. It is proved beyond all doubt that the offer was made, that it was not accepted at that time, but that it was intimated, "Whenever we call for it, you must perform the offer you have now made," and, upon the faith of that promise, the bankers go on making very large advances to the debtor to enable him to carry on his business up to the time when his [755 failure took place. Is that within the 92d section? If not, there is no case whatever. The learned judge of the County Court has examined the case with the most scrupulous accuracy, and, acting upon the authorities to which he refers, and which cannot in any degree be gainsaid, has come to the conclusion that the promise was actually made, and that the performance of it was exacted by the bankers at the time mentioned in the evidence; and if it were proved far more clearly than it is (I admit that a great deal towards it is proved) that they knew that the debtor was then in failing circumstances, still, on the authority of the cases which have been referred to, they were not precluded from insisting on the performance of that promise on which they had acted for several months since it was made.

Now, that is the whole case; and unless I were to hold that, when the bankers, having a security offered to them, say, "We will not have it now, but the time may come when we will call upon you for it"—unless I were to hold that that is an evasion of the law, an illegal transaction, fraudulent against the other creditors, I can find no fault with the transaction. If I were so to decide I should be doing so for the first time, because, although I admit that the distinctions in some of the cases are in no small degree embarrassing, yet upon the plain facts of this case, in my opinion, no jury could come to any other conclusion than this, that the security was given in pursuance of a former promise which had been acted upon by the bankers, and which the debtor was ready to fulfil, and that it was not done with any intent to prefer them to his other creditors.

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The intention must be referred, as the Lord Chief Justice said in *Bills v. Smith* (¹), to an actual obligation, an undertaking which the debtor had given, and which he was peremptorily called upon to fulfil. In that I can see nothing in the slightest degree unlawful, nor can I refer it to any motive actuating the debtor to prefer one creditor to another. He seems to have been in a sort of despair how he was to pay his debt; he knew he was bound by the obligation he had come under to give the security. But then the security is challenged, and it is said that either the Bills of Sale 756] Act, or the Merchant Shipping Act, *forms an objection to its validity. I cannot see that there is the slightest ground for saying that either act affects it. Whether this thing was a ship or not, although I know not by what other name it could be called, it was the property of the debtor, and it was, to the full extent of his interest, pledged and mortgaged by him. A more absolute form of pledge cannot be conceived than this certificate, by which, under his hand, he declares that he has built the ship for John Scott, and that John Scott is the owner of it. I cannot conceive a more absolute transfer of property than that document contains. From the moment it was signed the property in the ship would be in John Scott, by the acknowledgment of the man who had built her, and after that she was John Scott's ship, to be dealt with as he thought fit. He dealt with her thus: He took actual possession of her—that he put his name on her does not make any sort of difference, but he took actual possession—and I should like to know upon what ground his possession could be disputed. As I read the certificate, stating him to be the sole owner, he took possession of nothing which belonged to Softley, nothing was left in Softley's order or disposition, but with the certificate in his hand Scott took possession of and wrote his name upon the ship.

In my opinion, the order appealed against is quite right on every ground. The only doubt I have entertained during the discussion is as to the further advance of £770 made upon the assignment of Avery's debt, and upon that I follow the judgment as I read it, for I cannot read the words of the order in any other sense than this. Upon that day, when insolvency was avowed by the debtor, and notorious to the bankers, they exact from him an assignment of Avery's debt upon consideration that they will advance him £770. To the extent of the £770 the assignment of the debt is, in my opinion, a good security to the bankers, because there

(¹) 6 B. & S., 314.

was a perfect equivalent given for it. It does not prefer them in any way to the other creditors; it places them only in the situation of the bankrupt, who received the whole of the £770 in full. But beyond that, notwithstanding the terms of the assignment, it is no security at all, and it cannot be held as against the trustee in the liquidation. It is a security for £770 only, and so I consider that the learned judge has decided. *Beyond that I cannot perceive, [757 either in the terms of his order as it is drawn up, or in his judgment which has been read to me, any authority for saying that the bankers are at liberty to place the proceeds of the assignment against their general debt, or to take more of those proceeds than will reimburse them the £770 which they have advanced. With these observations, all I can do is to dismiss the appeal. If it is necessary to insert any words in the order, limiting the interest which the bankers take under the assignment of Avery's debt to £770, I shall be very willing to introduce them. Considering the difficulties of the case, and the fact that the decisions are by no means so clear as one would like to find them, as affecting transactions of a class very frequent among all men of business in the commercial world, I do not think I ought to make the appellant pay the costs of this appeal.

Mr. *De Gex*: We shall be entitled to consolidate our two securities, and they must redeem both or neither.

SIR JAMES BACON, C.J.: Certainly not. Out of what you may receive from Avery's debt, you are entitled to take £770, and no more. By no tacking or other magical operation can you mix up the two securities. Otherwise, sect. 92 would clearly apply, and there would be a preference of one creditor over the others.

Solicitor for the trustee: Mr. *S. R. Hoyle*, agent for Messrs. *Hoyle, Shipley & Hoyle, Newcastle*.

Solicitors for the bankers: Messrs. *Waterhouse & Winterbotham*, agents for Messrs. *J. & R. S. Watson, Newcastle*.

Solicitor for *Marshall & Co.*: Mr. *G. B. Wheeler*, agent for Mr. *H. S. Sewell, Newcastle*.

[Law Reports, 20 Equity Cases, 763.]

C.J.B., July 19, 1875.

763] **Ex parte* READER. *In re* WRIGLEY.*Fraudulent Preference—Pressure—Trial by Jury—Application for New Trial—Time—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 92—Bankruptcy Rules, 1870, r. 140.*

A creditor suggested to his debtor that the latter should buy goods on credit from other persons, and should with the proceeds of their sale pay off the debt due to the former. The debtor adopted the suggestion, and out of the proceeds of the sale of goods which he obtained on credit he made several payments on account of the debt. There was evidence that the payments were made under pressure from the creditor. The debtor afterwards filed a liquidation petition:

Held, that, as the transaction was fraudulent in its inception, it was immaterial that the payments were made under pressure, but that they must be set aside as being fraudulent preferences.

Where a jury have found a verdict on an issue of fact, but no order consequent thereon has been made by the judge, it is not necessary that an application for a new trial should be made within twenty-one days from the finding.

Rule 148 of the Bankruptcy Rules, 1870, does not apply to such a case, either directly or by analogy.

THIS was an appeal from a decision of the judge of the Oldham County Court.

Samuel Wrigley was a cotton-spinner at Oldham. He commenced business there in January, 1873. He took a lease of a mill and purchased the machinery in it for £4,750; of this sum he paid only £600, and to secure the payment of the balance he gave the vendors a bill of sale of the machinery. On the 15th of January, 1873, he entered into an agreement in writing with Messrs. Reader & Charney, cotton brokers at Liverpool, by which, in consideration of their making advances to him to the extent of £1,000, he agreed to allow them to charge a profit of three-sixteenths of a penny per pound on the net weight of all cotton used in his mill (in addition to the ordinary brokerage charges and 5 per cent. interest); also to instruct the buyers of his yarn to pay their purchase-money to Reader & Charney, and, in the event of his collecting any of the accounts himself, he engaged immediately to pay the same to them. He 764] was also to permit them to have access *to the books of the mill whenever required, and to furnish them with an account of all deliveries of yarn, with buyer's name, on the day of delivery, and to render a monthly account of all waste and fly bought by him. When this agreement was entered into Reader & Charney knew that he had not paid the whole purchase-money for the machinery, but they did not know until the following May that he had given any bill of sale of the machinery. They had advanced him

£300 before the agreement was signed, and they continued afterwards to make him considerable advances, both in money and cotton, until the beginning of July, 1873. He did not, however, properly carry out the terms of the agreement, and he failed to supply them with the monthly accounts. At the beginning of July, 1873, upwards of £2,000 was due them. At the end of June a person named Miles Crompton was, at the instance of Reader & Charney, appointed bookkeeper to Wrigley, and they paid a part of his salary. After his appointment Crompton was in the habit of keeping them regularly informed of the state of Wrigley's affairs. On the 4th of July Charney met Wrigley on the Manchester Exchange, and told him that his firm would not make him any more advances. Charney also said to him, "You must try to pay us up. Do with other people as you have done with us; we have given you four months; you must get as long credit elsewhere." On the 4th of July, Crompton, on behalf of Wrigley, had written to Reader & Charney asking them to send at once a large quantity of cotton, and on the 5th of July they wrote to Wrigley as follows: "In reply to yours of yesterday, we wired you, as agreed upon; buy what you require in Oldham. This is in accordance with the arrangement between you and our Mr. Charney made in Manchester yesterday. Of course you will see to getting as long credit as you can, and buy only from those who are willing to let you have credit, as we are very anxious to get our account." After this Reader & Charney made no further advances to Wrigley, with the exception of a sum of £60 which they provided to enable him to pay his workmen's wages. He purchased a large quantity of cotton from other firms on credit, and with the proceeds of its sale he made payments to Reader & Charney to the amount of £1,200. On the 3d of October, 1873, he filed a liquidation petition. At that time he still owed them nearly £1,200. The trustee under the liquidation sought to recover from Reader & Charney the *£1,200 [765 which they had received, on the ground that the payments amounted to fraudulent preferences. To determine the question, an issue was directed to be tried by a jury on the 16th of May, 1875, the trustee being plaintiff and Reader & Charney defendants. At the trial Wrigley was examined as a witness, and in the course of his evidence he said, "I was pressed for payment, and I was pressed too much. I said once I could not pay more than £100 a week. That was about August. On the 22d May the defendants pressed for

a substantial security." The jury found a verdict for the defendants.

On the 12th of June the trustee gave notice of an application to the County Court for an order directing that the verdict should be set aside and a new trial had, on the ground that the verdict was against the evidence. No order consequent upon the verdict had been made by the judge. On the 18th of June the judge ordered that a new trial should take place on the 22d of July. From this order Reader & Charney appealed.

Mr. *Jordan*, for the appellants: I say, first, that the application was made too late. It has been held that, by analogy to rule 143 of the Bankruptcy Rules, 1870, which fixes twenty-one days as the time within which an appeal must be brought, an application for a rehearing ought generally to be made within the same period: *Ex parte Brown* (*). I contend that the same analogy holds good with regard to an application for a new trial, and here the application was not made till thirty-three days after the verdict was given.

But, upon the evidence, I contend that the verdict was right. What Charney said to Wrigley merely came to this: "You have deceived us, and we won't trust you any more. If you want credit, you must get it elsewhere. But you must pay us our debt." It was not intended as an invitation to commit a fraud. It is clear that the subsequent payments were made under pressure, and that is enough to support them: *Smith v. Timms* (*); *Ex parte Tempest* (*).

Mr. *Little*, Q.C., and Mr. *S. Taylor*, for the trustee, were not called on.

766] *SIR JAMES BACON, C.J.: Mr. *Jordan* has taken two points. He says, first, that the appeal is not in time. In my opinion it is in perfectly good time. The twenty-one days mentioned in rule 143 refer to an appeal from an order of the court. The observations made in *Ex parte Brown* (*) might apply to a case in which there had been an order made, but there has been no order in this case. The learned judge, for his own satisfaction, directed that there should be a trial before a jury. That he was greatly dissatisfied with the verdict given is quite clear, for on the application made by Mr. *Little*'s client he directed that there should be a new trial. The verdict of the jury was not conclusive to his mind. It was for him to adopt it or to direct a new trial, whichever he thought fit. He had made no order, and there is no point of time from which you can measure the period

(*) Law Rep., 9 Ch., 304.

(*) 1 H. & C., 849.

(*) Law Rep., 6 Ch., 70.

of twenty-one days. It is a matter purely within the discretion of the court. The objection on the point of time, in my opinion, wholly fails.

With regard to the other point, a more suspicious case cannot well be imagined. As I have already said, the learned judge was clearly dissatisfied with the verdict of the jury, and I do not see how he could do otherwise than direct a new trial. Under the circumstances, the fact that there was pressure before the payments were made is immaterial. [His Lordship read sect. 92.]

Where was the good faith on the part of the payees? It is not denied that, however ill this man had behaved to Messrs. Reader & Charney, however much he had falsified his returns, however much he had broken his agreement with them, Charney met him on the Exchange, and said to him in effect: "You are in a failing condition. You owe us money, and you cannot pay us. Go and rob"—I was going to say, and I do not think it is too strong an expression—"go and cheat somebody else, and with the proceeds of your cheating pay us." And these are the creditors who contend that the transaction was in good faith. I think that, on the evidence, the verdict cannot stand, and there must be a new trial.

Solicitors: Messrs. *Chester, Urquhart & Co.*, agents for Messrs. *Dawson & Scowcroft, Bolton*; Mr. *J. W. Mellor, Oldham*.

[Law Reports, 20 Equity Cases, 789.]

V.C.B., July 21, 1875.

*COGAN V. DUFFIELD.

[789

[1874 C. 20.]

Rectification—Settlement in pursuance of Articles—Limitation in default of Children—Ultimate Trust of Wife's Property to Wife—Arrears of Income due at death of Husband—Reduction into Possession.

A lady, possessed of about £12,000 consols, being engaged to be married, a draft settlement in the usual form was submitted to the intended husband, who objected to some of its provisions, and insisted that if there should be "no children," and he should survive his wife, the fund should belong to him. Articles embodying this provision were hastily signed before the marriage; and after the marriage, the fund having been transferred to the trustees, a draft settlement, in execution of the articles, was prepared, but objected to by the husband, and, as ultimately executed, contained limitations to the husband and wife and the survivor for their lives, and as to the capital to the children of the marriage absolutely, not to such as should attain twenty-one or marry, and without any limitation over, in the event of the death of a son or of an unmarried daughter under twenty-one. There was also a provision that "if there should be no child" of the husband and wife, and the husband should survive the wife, the fund should belong to him; but the deed contained

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no alternative limitation in the events of there being no child, and of the wife surviving the husband. The husband brought no property into settlement.

In the event, one child was born, but died an infant in the lifetime of both parents. The husband died; and his representative claiming the fund, subject to the widow's life interest—upon bill by the widow for rectification of the settlement, and for a declaration that she was entitled to the fund:

Held, that the transfer of the fund to the trustees was not a reduction into possession by the husband:

Held, also, that the settlement was not in accordance with the articles, and that it ought to be rectified; and that, in the events which had happened, the plaintiff was entitled to the fund:

Held, also, that the plaintiff was entitled to arrears of income due at the death of the husband.

CAUSE. Shortly before the 15th of March, 1867, the late Joseph Cogan, M.D., of Wheatley, Oxfordshire, and afterwards of Brighton, entered into an engagement of marriage with Miss Agnes Duffield, who was possessed of a fortune of £12,096 15s. 1d. consols, standing in her own name. Upon the engagement becoming known to her brother, Thomas 790] Duffield, he consulted the family solicitor, *Mr. Thomas Hedges Graham, who prepared a draft settlement in the usual form, giving the income to the plaintiff for her separate use without power of anticipation during the coverture, then to the survivor for life, and then as to both *corpus* and income (subject to a joint power, and, in default, a power to the survivor, to appoint amongst issue) in trust for all the children or any the child of the marriage who being sons or a son should attain twenty-one, or being daughters or a daughter should attain that age or marry; and in default of any such child, and in case Agnes Duffield should survive Joseph Cogan, for her absolutely, but if he should survive her then for her testamentary appointees or statutory next of kin.

Dr. Cogan, however, did not either refuse or agree to execute this draft.

On the 15th of March Mr. Duffield came down to Brighton, where his sister was staying, and with her concurrence called on Mr. Robert Gramshaw, a solicitor, and asked him to prepare an agreement for a settlement. Mr. Gramshaw accordingly called the same evening on Miss Duffield, and received her personal instructions; acting upon which, he prepared articles of agreement, whereby, after reciting that, whereas the draft of a marriage settlement had been already prepared, and had been "perused and assented to by" Dr. Cogan and Miss Duffield respectively, but that there was not then time to engross the same, it had been agreed that as soon as conveniently might be after the marriage, the stock should be transferred into the names of Thomas Duffield and Bernard Cogan, M.D. (also of Wheatley, a brother

of Dr. Joseph Cogan), upon the trusts therein declared, it was witnessed that it was thereby agreed that as soon as conveniently might be after the marriage, Miss Duffield should transfer, and "particularly" that Dr. Joseph Cogan should join in transferring, the stock then standing in her name into the names of Thomas Duffield and Bernard Cogan, upon the trusts declared in "the aforesaid draft marriage settlement, or as near thereto as circumstances will admit, or otherwise for the benefit of the said Agnes Duffield and Joseph Cogan, and their child or children, if any . . . the trusts of the income thereof being for the benefit of the said Agnes Duffield and Joseph Cogan during their lives; and the trusts of the capital being for and amongst the children according *to the appointment of the said [79] Joseph Cogan and Agnes Duffield, or the survivor of them, and in default of appointment to the children equally;" and that Joseph Cogan and Agnes Duffield agreed to do and execute all further acts and deeds "necessary for perfecting the said settlement, or carrying out the objects of this agreement."

Mr. Gramshaw took this draft agreement about ten o'clock the next morning to the Bedford Hotel, Brighton, where Mr. Duffield and the Doctors Cogan were present. He read the draft, and all parties were in agreement thus far—that Dr. Joseph Cogan "insisted on all reference to the proposed draft settlement in the agreement being struck out, and that, in case he should survive the plaintiff, and there should be no child of the marriage, the fund should be at his absolute disposal." As to what further took place at the interview, there was a diversity of recollection.

As the time fixed for the marriage was eleven o'clock that morning, Mr. Gramshaw hurriedly, and on the spur of the moment, prepared another agreement, which was executed by all parties immediately before the ceremony.

By this deed, made between Dr. Joseph Cogan of the first part, Miss Duffield of the second part, and Thomas Duffield and Dr. Bernard Cogan of the third part, it was agreed that Dr. Joseph Cogan should join Miss Duffield in transferring the consols into the names of the two trustees, and that they should hold the same, with powers of varying the investment of the trust property, with the consent and at the discretion therein mentioned; and the agreement continued thus:

"The trusts of the income thereof being for the benefit of the said Agnes Duffield and Joseph Cogan during their lives, and the trusts of the capital being for and amongst the

children, according to the appointment of the said Joseph Cogan and Agnes Duffield, or the survivor of them; and in default of appointment to the children equally; and in the event of there being no children, and of the said Joseph Cogan being the survivor, the trust property to be at his absolute disposal."

The marriage having taken place on the 16th of March, 1867, the sum of consols was transferred into the names of 792] Thomas *Duffield and Bernard Cogan; and in the course of the same year the draft of a settlement was prepared by Mr. Graham, in which the interests of the children were, in default of appointment, limited to those attaining twenty-one, or if daughters marrying under that age; but Dr. Joseph Cogan, without agreeing to or refusing to execute any such settlement, paid the costs of its preparation, and instructed his own solicitors to prepare a draft. This was done under the advice of Mr. J. L. Tatham, conveyancing counsel, and a similar clause to that last mentioned was inserted, with a limitation that in default of any "such" child, if the wife should survive the husband, the fund should be for her absolutely. Dr. Cogan objected to this, and caused the draft to be again laid before the same counsel, with the instruction that it was the wish of the parties that in default of issue the fund should belong to Dr. Cogan, whether he should be the survivor or not. Counsel altered the draft by vesting the interests of the children at birth, and in the margin made the following note:

"The trust as now altered agrees with the articles. I do not think a trust for such of the children as attain twenty-one is authorized by the articles."

But he added a clause, giving over (1) the interest of a son who should die under twenty-one, or of a daughter who should die under twenty-one unmarried, or the whole, in the event of there being no son who should attain twenty-one, and no daughter who should attain twenty-one and marry, upon the following trusts—if Dr. Cogan should survive his wife, in trust for him; but if he should die in her lifetime, in trust for her. Dr. Cogan was still dissatisfied, and the draft was again sent back to the same counsel, but he made no alteration in it; whereupon one of Dr. Cogan's solicitors himself altered the draft, inserting in the margin this note: "Altered, as now, in ink, to follow the language of the agreement." As thus altered, the draft was engrossed and executed. By the deed, which was dated the 1st of

(1) As in *Taggart v. Taggart*, 1 Sch. & Lef., 84, 89.

November, 1867, and expressed to be made between the husband and wife of the one part, and the trustees of the other part, after reciting the agreement of the 16th of March, 1867, and that it was intended "that the trusts *and [793 powers which were mentioned or indicated" therein should be by the present indenture "established or declared," and that "in order to provide for the disposition of the same trust fund and the income thereof, in cases not provided for by the same articles," it was agreed that such further trusts and powers as were declared or contained in the present indenture should be thereafter declared or contained, it was witnessed that the fund should be held upon trust to pay the income "to the said Joseph Cogan and Agnes his wife during their lives, and after the death of either of them, then to the survivor," during his or her life, and after the death of the survivor, as to the capital, in trust for the children and child of Dr. and Mrs. Cogan, as they should jointly appoint, and in default, "in trust for all the children (if more than one), or any the child if but one" of Dr. and Mrs. Cogan, "such children, if more than one, to take equally as tenants in common, or if there should be but one such child, then the whole for such one child." Then followed a hotchpot clause, and an advancement clause; and then it was agreed and declared that "if there shall be no child of" Dr. and Mrs. Cogan, the trustees should stand possessed of the fund and income upon trust, "if the said Joseph Cogan shall survive the said Agnes Cogan, for the said Joseph Cogan, his executors or administrators."

Thus the interests of children, in default of appointment, remained vested at birth; and the alternative limitation, in the event of Dr. Cogan dying in his wife's lifetime, having been struck out of the draft, the settlement contained no express limitation of the fund in this event.

There was issue of the marriage one child only, a son, who died when about six months old, in the lifetime of both parents.

On the 6th of October, 1870, Dr. Joseph Cogan made his will, whereby he gave all his real and personal estate to his brother, Bernard Cogan, the above-named trustee of the agreement and settlement, absolutely; and by a codicil, dated the same day, after giving his wife a legacy of twenty guineas, he continued: "As by her marriage settlement she is fully provided for, my wife will well understand my feeling in preferring to provide for my brother Bernard, the companion of my days, and fellow-worker, particularly as she is so well provided under settlement."

794] *Having made a further codicil, Dr. Joseph Cogan died on the 13th of June, 1873, and his will and codicils were shortly afterwards proved by Dr. Bernard Cogan in the Probate Court in Ireland.

The bill was filed on the 26th of January, 1874, by Agnes Cogan, widow, against Thomas Duffield and Bernard Cogan, stating the above facts, alleging that at Dr. Cogan's death some rents of certain real estate (which had been purchased during the coverture under the trusts of the settlement, and were part of the trust estate) were in arrear at Dr. Cogan's death, and that the defendant Bernard Cogan refused to account for them; and praying for a declaration that the settlement was not executed in accordance with the agreement, and that it might be rectified; for a declaration that the plaintiff was entitled to all arrears of rent due at the death of Dr. Cogan, and which had accrued since, and that she was now absolutely entitled to all the trust property; and that the defendants might be ordered to convey and transfer the same to the plaintiff, or that the trusts of the agreement and of the settlement, when rectified, might be administered under the direction of the court.

The defendant Dr. Bernard Cogan, by his answer, claimed to be entitled to the fund, subject to Mrs. Cogan's life interest, as representative and legatee of his brother.

There was no dispute as to the facts as stated above.

Dr. B. Cogan, by his answer, said that his late brother had a large professional income, and was possessed of private means. From conversation with his late brother, he knew that both he and the plaintiff were "opposed to" such a settlement as was prepared by Mr. Graham, and that "they desired to marry without any settlement at all," but that his brother ultimately "consented to a settlement being made, so as to secure to the plaintiff a life interest in the property in the event of her surviving him, and to limit the property to the issue, if any, of his said marriage, but objected altogether to any further interference with his marital rights."

His statement as to what took place at the meeting on the morning of the 16th of March was as follows:

Mr. Gramshaw "produced an agreement for a settlement 795] ready *prepared, and endeavored to get the said Joseph Cogan to sign the same. Joseph Cogan refused to sign such agreement, on the express ground that it would interfere with his marital right, and might cause the property to revert, in default of issue of the marriage, to the plaintiff's family, to which he decidedly objected. In his presence,

and by his desire, I proposed to Mr. Gramshaw that Joseph Cogan should write a letter engaging to invest the money in such a manner as to secure it after his decease to the plaintiff for life, and to her children by him, because, as he said, he could understand that; but he stated that he did not feel that he understood the effect of the agreement which was proposed for his signature. Mr. Gramshaw then positively assured the said Joseph Cogan that the proposed agreement would not have the effect of causing the property to revert to the family of the plaintiff; and on that assurance Joseph Cogan consented to sign the said proposed agreement."

On the other hand, Mr. Gramshaw and Mr. Duffield, on behalf of the plaintiff, deposed that, except in the particulars first stated above, Dr. Joseph Cogan "assented to" the draft agreement brought to the hotel by Gramshaw; and, further, that "Joseph Cogan never raised any objection to the property becoming the absolute property of the plaintiff, in case she should survive him, and there should be no children who should attain twenty-one or marry." They also contradicted the defendant's statement as to his proposal that Dr. Joseph Cogan should write a letter, and as to Dr. Joseph Cogan's remark upon that proposal.

Dr. Joseph Cogan brought no property into the settlement.

Mr. *Davey*, Q.C., and Mr. *Jason Smith*, for the plaintiff: We say, first, upon the construction of these articles, as they stand, there is a trust, in the events that have happened, for the plaintiff. Secondly, in carrying into effect executory articles, the court always limits the interests of children to such children as shall attain twenty-one, or if females, marry under twenty-one; and, thirdly, there is, independently of the articles, in the events that have happened, a resulting trust for the plaintiff.

In construing the articles, the court is at liberty to look at the surrounding circumstances. To what did the late Dr. Cogan at the interview of the 16th of March object? He objected to the reference contained in Gramshaw's draft to the former draft settlement by Graham; and he insisted upon a limitation of the property to himself if he should survive his wife, and there should be no children. To all the rest he assented; that, we say, is the result of the evidence; and the consequence is, that Gramshaw's draft is imported into the evidence. The court is enabled to look at it.

When looked at, it is found to contain a declaration of

trusts by reference to those in the draft marriage settlement prepared by Graham, and an agreement by Dr. Joseph Cogan and Miss Duffield, to do all acts necessary for perfecting that settlement. To this reference Dr. Cogan objected; and why? Because he wished to secure the estate in the events above mentioned to himself: but in these events only. The draft settlement prepared by Graham contained a limitation to the plaintiff in the events of her surviving her intended husband, and there being no children, and to that Dr. Cogan assented. It was only in one event, which has not happened, that any departure from Mr. Graham's draft was intended. By the light of these two former documents, the true construction of the articles is ascertained.

Taking this agreement as executory articles which have to be carried into effect by the court, how would the settlement be framed? The gift to children would be to such children only as attained twenty-one or married; so that upon the death of a son or of an unmarried daughter under age, the property would not belong to the surviving father as representative: *Taggart v. Taggart* (1); *Spirell v. Willows* (2); *Young v. Macintosh* (3); *Blackburn v. Stables* (4).

The frame of the settlement consequently is wrong in this respect. It may be said that *Taggart v. Taggart* does not carry us far enough, but it gives effect to the last clause of the settlement, by showing that "if there shall be no child" will be held by the court to mean "no child who shall attain twenty-one or marry;" thus preventing Dr. Cogan from taking as representative of his son, and supplementing the express provision in the event *(which did not happen) of Dr. Cogan surviving, by suggesting the inference that, if Mrs. Cogan should survive, the property should revert to her. That is how the draft was drawn by the conveyancer.

Being entitled to the income the plaintiff is clearly entitled to the arrears of rent.

As to the resulting trust: Mrs. Cogan is the survivor; this was her money; the husband never reduced it into possession: *Pringle v. Pringle* (5); it never stood in his name; and if, as may be contended on the other side, the settlement contains no implied limitation, but is silent as to what is to become of the fund in the event of the wife surviving,

(1) 1 Sch. & Lef., 84, 89.

(2) Law Rep., 4 Ch., 407.

(3) 13 Sim., 445.

(4) 2 V. & B., 367, 370.

(5) 22 Beav., 631.

then it must be as if the settlement were out of the way, and there is a resulting trust for the wife.

Supposing there had been six children, and five of them had died under age, can it be conceived to be the true construction of the agreement that the father might take five-sixths of the fund, and leave the surviving child only one-sixth?

Mr. *G. W. Lawrence*, for the defendant Thomas Duffield.

Mr. *Kay*, Q.C., and Mr. *Freeling*, for the defendant Bernard Cogan: The case must be decided on the construction of the agreement, which is silent on the subject of what is to happen if Mrs. Cogan should survive. But why silent? If the surrounding circumstances are gone into, it will be found that, after considerable discussion, and resort to the best advice, the omission was intentionally made. The question of how far the husband would consent to give up his marital right was finally settled.

Then, what right has the plaintiff to have this settlement rectified? She must show that it was drawn in its existing form by a mistake which was common to all parties: *Rooke v. Lord Kensington*(¹). If it was drawn pursuant to the intention of one of the parties, but as to the other under a mistake, it cannot be rectified: *Sells v. Sells*(²); *Earl of Bradford v. Earl of Romney*(³); *Harris v. Pepperell*(⁴); *Thompson v. Whitmore*(⁵); and the *intention of the [798 parties means their intention at the time, not that which would have been their intention had they foreseen the result: *Wilkinson v. Nelson*(⁶); *Barrow v. Barrow*(⁷).

The question is, how far did Dr. Cogan agree to give up his marital right. On the morning of the marriage, they knowing that he had not executed Mr. Graham's draft, present to him another, in which reference is made to that draft. To this he objects, and then the present articles are drawn, which are agreed to and executed. By them the marital right, in the events which have happened, is not interfered with. The court never interferes with the marital right beyond what is necessary: *Walsh v. Wason*(⁸); referring to *In re Suggitt's Trusts*(⁹).

Further, by permitting the transfer of the fund from his wife's name into the names of the trustees, Dr. Cogan did, in equity, reduce this fund into possession: *Burnham v.*

(¹) 2 K. & J., 753.

(²) 1 Dr. & Sm., 42.

(³) 30 Beav., 431, 438, 439.

(⁴) Law Rep., 5 Eq., 1, 4.

(⁵) 1 J. & H., 268.

(⁶) 9 W. R., 393.

(⁷) 18 Beav., 529.

(⁸) Law Rep., 8 Ch., 482.

(⁹) Law Rep., 8 Ch., 215.

Bennett ('); *Cunningham v. Antrobus* ('); *Hamilton v. Mills* (').

The narrative shows that either in one way or the other the conveyancer was clearly wrong. Either he should not have inserted the limitation over in the event of death of a child under twenty-one or marriage, or he should not have inserted the limitation to Mrs. Cogan if she should survive. Both these clauses were pure invention on his part; the proper limitation would have been to the children, so as to vest at birth. Not only are they not according to the written agreement, but they are contrary to Dr. Cogan's express declaration, who said that this was the last thing he would consent to.

Taggart v. Taggart (') shows only this—that there ought to be a provision for limiting the fund over in case any of the children shall die under twenty-one and without issue; it does not prescribe any form of ultimate limitation.

Mr. *Davey*, in reply.

SIR JAMES BACON, V.C.: The whole question seems to 799] turn upon the construction of *this agreement, which preceded the marriage, and which was not come to hastily.

It was executed hastily, no doubt, but it was not come to until after the subject had occupied the attention of both parties to the marriage.

The lady had a fortune of some £12,000 consols. The gentleman did not settle anything, whatever his other property might be. The object and purpose of the agreement being signed was, that the disposition of the £12,000 consols should be settled by contract between the parties.

The surrounding circumstances must, no doubt, in all propriety and fairness, be regarded. The surrounding circumstances are stated by Dr. Bernard Cogan. In his answer he says, that upon the agreement being presented by Mr. Gramshaw on the day on which the marriage was afterwards celebrated, Joseph Cogan refused to sign the agreement on the express ground that it would interfere with his marital right, and might cause the property to revert, in default of issue of the marriage, to the plaintiff's family—to which he decidedly objected. Then he says he proposed that Joseph Cogan should write a letter, so as to secure the property, after his decease, to the plaintiff for life, and to her children by him, because he said he could understand that, but he did not feel he understood the effect of the agreement. Then the answer states: "Mr. Gramshaw posi-

(¹) 2 Coll., 254.

(²) 16 Sim., 436.

(³) 29 Beav., 193.

(⁴) 1 Sch. & Lef., 84, 89.

tively assured Joseph Cogan that the proposed agreement would not have the effect of causing the property to revert to the family of the plaintiff, and on that assurance Joseph Cogan consented to sign the proposed agreement."

On the other hand we have the depositions of Mr. Gramshaw and Mr. Duffield, who were both present at that meeting. Mr. Gramshaw says: "I read the draft agreement to Joseph Cogan" (that is, as it was originally drawn), "but he insisted on all reference to the proposed draft settlement in the aforesaid agreement being struck out." That was acceded to. "And he also insisted that in case he should survive the plaintiff, and there should be no child of the marriage, then that the trust property should be at his absolute disposal." He says further that Joseph Cogan "never raised any objection to the property becoming the absolute property of the plaintiff, in case she should survive Joseph Cogan, and there should be no children who should attain *twenty-one or marry." Mr. Thomas Duffield's de- [800 position is exactly in the same terms in those two particulars.

Now I have to consider the surrounding circumstances, and they are these: A settlement had been prepared in draft, the stipulations of which it is not necessary to go into very fully. Interests were given to the husband and the wife for their respective lives, and for the life of the survivor, with a power of appointment for the intended wife, subject to the life interest of the husband. That draft settlement Joseph Cogan positively refused to have anything to say to. He would not execute that settlement because, as I gather from Dr. Bernard Cogan's deposition, he saw that, in that event, if the limitation went to the next of kin, it would revert to the wife's family, and that was the ground of his objection. But when the agreement is proposed to him—that being his objection to the agreement, and the objection, therefore, to the settlement—he insists upon all reference to the settlement being struck out, and he signs an agreement by which he stipulates and agrees that the trusts of the income shall be "for the benefit of the said Agnes Duffield and Joseph Cogan during their lives, and the trusts of the capital for and amongst the children, according to the appointment of Joseph Cogan and Agnes Duffield, or the survivor of them; and in default of appointment to the children equally; and in the event of there being no children, and of the said Joseph Cogan being the survivor, the trust property to be at his absolute disposal."

In my opinion the words of that contract are perfectly clear and distinct, as far as they go. The marital right, which is spoken of, and which then had not begun its existence, must have been in the contemplation, at least of Dr. Joseph Cogan, if not of the other parties; but a marital right *in esse* is disposed of by the agreement. The lady has got £12,000 consols; she is to transfer it, and he is to join with her in transferring it. It is said that that is a reduction into possession. I must say that no one of the cases which have been cited seems to me to justify that contention. In the case of *Cunningham v. Antrobus* (¹), before Sir Lancelot Shadwell, which seems to have given him some trouble, he concluded that, where a transfer had been made 801] by the trustees *of the fund to persons who were known to be trustees of the marriage settlement, it being allowed there to remain, and nothing more being done, that must be held to have been an exercise by the husband of his right to reduce the fund into possession for the purpose of the settlement.

The other case, *Burnham v. Bennett* (²), before Vice-Chancellor Knight Bruce, was plainly relieved from the difficulties which weighed upon Sir Lancelot Shadwell. There the husband after marriage dealt with the fund which was the property of his wife, took a new security for part of it, caused another part of it to be transferred, and the Vice-Chancellor was of opinion that there had been a reduction into possession.

What reduction into possession is there here, beyond the fact that the husband joined in the transfer, if he did join in it (as to which there is no evidence at all), for the purpose, not of reducing it into possession, but of making it subject to the terms of the settlement that was to be executed in pursuance of the agreement, and as to which, in the meantime, he was bound by the provisions of the agreement? But the agreement is defective, as Mr. Tatham, upon settling the draft settlement, afterwards points out. He supplies that defect. Why? Because, as a lawyer, he knew, if he had not had the case of *Taggart v. Taggart* (³) before him, that the principle of the law is, that where there is an executory contract, and it becomes necessary afterwards to execute that contract in the formal way, it must be executed according to the decisions of the court, and that the executory agreement is only a note or memorandum of something which is to be reduced into more formal expression. He therefore inserted those provisions which he thought were

(¹) 16 Sim., 436.

(²) 2 Coll., 254.

(³) 1 Sch. & Lef., 84.

necessary. Being convinced that the lady had not by the agreement parted with more of her interest in the fund than was actually expressed in the agreement, namely, that if these two events should occur—if there should be no child, and if Dr. Cogan should survive her—he was to have the disposal—Mr. Tatham did what seems to me to be perfectly right and proper, and what would have been done in the Judge's Chambers if there had been a reference to settle the draft settlement. He introduced the provisions which were afterwards struck out, but struck out under *circum- [802 stances which are not very clearly explained. I do not think there was anything wrong in it, but it seems that—Mr. Tatham still persisting in the necessity of his draft being allowed to remain in the shape in which it was before—Mr. Anstie, or somebody else, makes a pencil alteration in it, writes in the margin, “Altered as now, in ink, to follow the language of the agreement,” that part of the settlement is reduced to the very words of the agreement, without addition or alteration, and the question as to what is the meaning of the agreement in that respect, is left to be decided at some future day.

I do not entertain any doubt about what the meaning of the agreement is. I cannot put upon it so preposterous and unreasonable a construction as to suppose that, if of this marriage there had been born ten or any other number of children, and all of them but one had died under twenty-one, the father, as their administrator, was to take nine-tenths of this fund for himself, and leave the only surviving child of the marriage with no other provision than one-tenth of the fund, which, according to all reason and sense, it was intended should be a provision for the children after the death of the husband and wife, subject, of course, to their powers of appointment.

In a recent case of *Smith v. Iliffe* (') (which I do not say was exactly like this), I had to consider how the court would deal not only with an executory instrument, but with a case that was much stronger than the present. The lady had married during her minority, the court had approved of the settlement upon her marriage, and she came to complain that the court had done that improvidently—that the court had not provided for her interests as they ought to have been provided for, she being a minor; and, in the events which had happened, I was very easily convinced that it was the right of the lady to have the settlement reformed, and put in such a shape as the court would have approved

(') *Ante*, p. 666.

1875

Cogan v. Duffield.

V.C.B.

of, if the thing were new and nothing had been done. That did not differ from the principle of *Taggart v. Taggart* ⁽¹⁾ in the slightest degree. It was only stronger, because the settlement had been executed under the sanction of the court.

To come back to this case, in my opinion this agreement, 803] the *construction of which is the only question before me, presents no reasonable difficulty. It was executed, as I have said, in haste on the morning of the marriage. It provides properly for the husband and wife for their lives; it provides for the children, although imperfectly; and if there now were children of the marriage I should not hesitate one moment in saying that in reforming, or rather in completing, this settlement, it would be necessary to introduce those limitations which Mr. Tatham proposed to put into the draft, and which were afterwards struck out because they were not contained in the agreement. There was but one child of the marriage born, and that child lived only a short time. The husband and wife lived together. Then the husband died in 1873, and up to that time the settled property was enjoyed as the settlement proposed it should be enjoyed, and as the articles intended it should be enjoyed, during their joint lives. The rents or income were received by the husband. There was no reason why they should not be, under those circumstances. Upon the death of the husband, there being two persons entitled under the agreement as joint tenants, when one died and the other of necessity became entitled to the whole income, there can be no question, or no serious question, as to the arrears which were due at the death of the husband. No doubt they belong to the wife. Then, unless I am to hold that the effect of the agreement for a settlement is directly contrary to all ordinary practice, and to all reasonable intendment by the parties, I must say that, although it does not carry the intention of the parties into full effect, it contains the means which enable this court to declare that the settlement is imperfect in this respect, that it does not give to the wife that which she is entitled to whether as a resulting trust or otherwise, namely, that part of her property which is not the subject of the settlement. The settlement has performed its full office; all its objects and purposes have been completed and satisfied, and all that remains is the property of the wife, because it was neither contracted for nor included in the settlement which was executed.

⁽¹⁾ 1 Sch. & Lef., 84.

In my opinion, therefore, the plaintiff is entitled to the relief which she asks, upon both grounds.

There will be a declaration that the settlement was not in accordance with the agreement made previously to the marriage, *and that it ought to be rectified, and reformed [804 so as to carry that into effect ; and then declare that in the events which have happened the plaintiff is entitled, according to the second paragraph of the prayer of the bill, to all arrears of rent due at the time of the death of Joseph Cogan, and is now absolutely entitled to the trust property.

There will be a direction to convey the real estate, and to transfer the consols.

The costs of the suit, having been arranged, were ordered by consent to be paid out of the trust fund.

Solicitors for the plaintiff and defendant Duffield : Messrs. *R. S. Taylor & Son.*

Solicitors for the defendant B. Cogan : Messrs. *Vizard, Crowder & Anstie.*

C A S E S
DETERMINED BY THE
CHANCERY DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
CHIEF JUDGE IN BANKRUPTCY,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE
AND IN
L U N A C Y.

[Law Reports, 1 Chancery Division, 9.]

C.A., Nov. 4, 1875.

9]

*HODGES V. FINCHAM.

[1875 H. 67.]

Practice—Judgment to be dealt with as the Court shall direct.

A defendants, in a suit in chancery, gave judgment in an action at law "to be dealt with as the court shall direct":

Held, that although liberty to enforce the judgment would not generally be given until the merits of the case were disposed of, the court was not precluded from allowing execution to issue at an earlier stage of the cause.

THE defendants, Fincham and Bellyse, who had been partners, were officers of a benefit society of which the plaintiffs were the trustees. On the 28th of July, 1874, the defendants signed a memorandum by which they admitted that there was due to the society from them jointly £1,613. On the same day the defendants signed an agreement to assign to the plaintiffs, when required, the debts due to their late firm. These debts amounted to £988. They also gave to the plaintiffs, on the 4th of August, 1874, a joint and several bond for payment of the £1,613 with interest.

On the 17th of January, 1875, the plaintiffs commenced

an action against Fincham on the bond, and applied to the defendants to assign the debts. Bellyse was willing to execute the assignment, but Fincham refused, and the plaintiffs, on the 10th of March, 1875, filed a bill for specific performance of the agreement to assign the debts, and for a receiver.

By an order made on the 18th of March, 1875, on a motion for a receiver, Fincham undertaking, with the concurrence of Bellyse, to give judgment in the action "to be dealt with as this court shall direct," T. M. Park was appointed receiver of the debts.

Judgment was accordingly signed in the action for £1,500, the amount remaining due on the bond, and the costs of the action.

On the 12th of October, 1875, the plaintiffs' moved before Vice-Chancellor Bacon, as vacation judge, for leave to issue execution. This was supported by an affidavit of the receiver and the solicitor of the plaintiffs, from which it appeared that the receiver had got in debts to the amount of £122, and that, having regard to the difficulties in getting them in, he believed that, after all that could *be got in [10 had been realized, there would be a deficiency of at least £1,100. It further appeared from the affidavit that on the 2d of October Fincham had advertised his furniture for sale, and that some of it had been removed. The plaintiffs' solicitor deposed that, so far as he knew, Fincham had no other property on which execution could be levied.

Vice-Chancellor Bacon having refused the application, it was now renewed before the Court of Appeal.

Cozens-Hardy, for the appeal: If all the debts are got in, the plaintiffs will still be unpaid by some hundreds of pounds; and as Fincham is selling his only property, it is necessary for the safety of the plaintiffs that execution should issue. They are willing to bring the proceeds into court if the court thinks it desirable.

[JAMES, L.J.: Have you any authority for holding that where judgment is given to be dealt with as the court shall direct, the court will deal with it before the hearing? The case does not seem the same as where judgment is given subject to a direction that execution shall not issue without leave of the court.]

I cannot find any authority either way; but I submit that the court, under an order in this form, must have jurisdiction to deal with the judgment at any period when the justice of the case requires it.

No counsel appeared for the respondent.

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JAMES, L.J.: It appears to me that the meaning of the direction in the order, which is quite a common form, is merely that the plaintiff shall not enforce the judgment without the direction of the court; and that although in general the court would not direct a judgment to be enforced while there remained anything to be tried in the cause, there is nothing to preclude the giving such a direction before the hearing. In the circumstances of the present case, as the judgment is likely to prove valueless if not enforced at once, and the debtor does not appear here to give any explanation, I think it right to allow the judgment to be enforced. As [1] the appellants *do not object to bringing the proceeds into court, let them be directed to do so, and let them be at liberty to add their costs both below and here to the debt.

MELLISH, L.J., concurred.

Solicitors: *Field, Roscoe & Co.*

[Law Reports, 1 Chancery Division, 13.]

C.A., Nov. 5, 8, 12, 1875.

13]

*MACDOUGALL V. GARDINER (').

[1874 M. 200.]

Practice—Bill against Directors of Company—Shareholder's Suit on behalf—Authority of Chairman of Meeting—Motion for Adjournment—Mode of taking Votes.

The articles of association of a company gave power to the chairman at any general meeting of the company, with the consent of the meeting, to adjourn the meeting, and also provided for taking a poll if demanded by five shareholders. At a general meeting of the company the adjournment of the meeting was moved, and, on being put, was declared by the chairman, who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the room. One of the shareholders [1] filed a bill on behalf of *himself and all other shareholders except the directors, against the directors and the company, stating these facts, and alleging that the course taken at the meeting was taken in collusion with the directors, with a view of stifling discussion, and that the directors were intending to carry out certain measures injurious to the company without submitting the terms to a general meeting; and praying for a declaration that the conduct of the chairman was illegal and improper, and for an injunction to restrain the directors from carrying out the proposed arrangements without submitting them to the shareholders for their approval:

Held, on demurrer (reversing the decision of Malins, V.C.), that the bill could not be sustained, inasmuch as it violated the rule laid down in *Mosley v. Alston* (') and *Poss v. Harbottle* ('), and asked the interference of the court in the internal management of the company.

Whether, on a motion for the adjournment of a meeting of shareholders, the votes ought to be taken according to the number of shareholders or of the shares they represent, *quære*.

THIS was an appeal from a decision of Vice-Chancellor Malins overruling a demurrer to the bill (').

(') Reversing, *ante*, p. 388.

(') 1 Ph., 790.

(') 2 Hare, 461.

(') Law Rep., 20 Eq., 383, *ante*, p. 388.

The bill was filed by Alexander William MacDougall, on behalf of himself and all other shareholders in the Emma Silver Mining Company, Limited, except the directors, against the directors and the company.

The bill, after stating that the company was incorporated in November, 1871, for the purpose of working a mine in the United States of America, called the Emma Silver Mine, set out several of the articles of association, amongst which were those numbered 40 and 42, which provided for summoning special general meetings, and 45, which enabled any member to propose and introduce at a general meeting any subject relating to the affairs of the company of which he had given a certain notice, and also the following articles :

49. The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place ; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

50. At any general meeting, unless a poll be demanded by at least five members, a declaration by the chairman that a resolution *has been carried, and an entry to that [15 effect in the book of the proceedings of the company, shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favor of or against such resolution.

51. If a poll be demanded by five or more members, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting, the chairman of the meeting shall be entitled to a second or casting vote.

53. Every member shall have one vote for every share held by him.

57. Votes may be given personally or by proxy.

The bill also, after stating that the plaintiff became a shareholder in 1874, and was, when the bill was filed, the registered holder of 1,750 shares in the company, alleged various fraudulent transactions on the part of the promoters and the company, and that the plaintiff and other members of the company believed that the present directors were interested in these matters adversely to the company, and therefore desired to have some person elected a director who would endeavor to obtain a full investigation of these matters.

The allegations contained in the bill on this subject are stated at greater length in the previous report.

According to the statements in the bill the plaintiff and his friends being unsuccessful in their efforts, in September, 1874, signed a requisition calling on the directors to summon an extraordinary general meeting for the purpose of requesting the chairman, Colonel Gardiner, to resign his directorship, and to appoint another director in his place. This requisition was signed by shareholders holding more than one-fifth of the capital of the company. And accordingly, on the 6th of October, 1874, the directors issued a notice convening a special general meeting for the 14th of October.

The plaintiff received proxies authorizing him to vote at the special meeting from shareholders holding 15,000 shares, while the directors did not receive proxies to an extent reaching one-half of the number of shares represented by [6] the plaintiff. *Previously to the meeting, the directors sent stamped proxies round to each of the shareholders, empowering Mr. Hutton, one of the directors, to vote for them at the meeting and at any adjournment.

Although the plaintiff and his party had such a majority if all the votes were properly polled, the defendants filled the room with persons holding one or two shares each, who, on a show of hands, would give the defendants the majority of votes.

The plaintiff prepared several resolutions for the purpose of proposing them at the meeting, the two first of which were as follows:

1. That in the opinion of this meeting it is not consistent with the best interests of the company that Mr. Robert May Gardiner should remain a director of the company, and that he accordingly be requested to resign his office.

2. That the said Mr. Robert May Gardiner not being present to meet the shareholders of this company, after the requisition calling this meeting (first lodged on the 8th of September last), and signed by shareholders, he is now removed from the office of director, and that Mr. be appointed a director in his stead.

The meeting took place on the 14th of October, 1874. Colonel Gardiner was absent in America, and Mr. Hutton was in the chair. He addressed the members, and urged an adjournment of the meeting, partly on the ground that a petition to wind up the company had been presented by a shareholder, and that it was expedient to postpone the discussion of the matters before the meeting until after the petition had been disposed of. The plaintiff proposed the first resolution, and it was discussed by the chairman.

Various trivial objections were taken to it, such as that it ought to have embraced the appointment of a new director as well as a request to Gardiner to resign. On that ground Mr. Hutton refused to put the first resolution to the meeting, although Mr. Burnand, the only other director present, openly dissented from that view. In the midst of the discussion which followed, and after the plaintiff had pointed out that if the resolution were passed he would follow it up by others, copies of which the chairman held in his hand, a member proposed the adjournment of the *meeting [17 for a month. This proposal was seconded, and the chairman then put the resolution to the meeting, and declared it to be carried.

The 25th, 26th, and 27th paragraphs of the bill contained in substance the following allegations :

25. The friends of the directors voted in favor of the resolution, while the plaintiff and the shareholders acting with him voted against it; and the chairman declared, on the show of hands, that the resolution had been carried. Five members of the company then present, including the plaintiff, demanded a poll; but the chairman refused to grant one, on the alleged ground that a poll could not be taken on the question whether the meeting should be adjourned or not, at once left the chair, declaring the meeting adjourned, and immediately left the room; but the demand for the poll was duly signed and handed in.

26. There was no ground under the articles of the company, or otherwise, for holding that a poll could not be taken upon whether the meeting of the company should be adjourned or not, especially when by the motion for adjournment the question before the meeting was, whether certain important matters should then be discussed and voted, or whether they should be postponed for a long or indefinite time. Mr. Hutton, however, had, in order to stifle the discussion, and to prevent the matters being voted upon to consider which the meeting was called, in collusion with the other directors, or some of them, determined to carry a vote of adjournment by show of hands and then to refuse a poll on that question, so as to prevent the proxies given to the plaintiff and his supporters from being used in support of the resolutions which he was about to bring forward, and which would undoubtedly have been passed but for the conduct of the defendants.

27. After the poll had been refused several of the members of the company, including the directors, left the room, but a large number still remained, who voted the plaintiff

into the chair, when the plaintiff's resolutions were passed, the name of Charles Henry Dunhill, M.D., of York, a duly qualified shareholder in the company, having been first added to the second resolution, he having been proposed and seconded and duly elected as a director of the said company in the place of Colonel Gardiner.

[18] *The 28th paragraph of the bill set out a letter by the plaintiff giving notice to the directors of the passing of the resolutions after Mr. Hutton had left the chair, and the allegations concluded as follows: •

“29. In this state of things the plaintiff and the other shareholders in the company believe, and it is the fact, that the defendants, the directors of the said company, are about to conclude some arrangements with the persons against whom the company has claims, such as the original vendors of the said mining property to the company, or the promoters of the said company, and others, for the purpose of settling those claims to the great injury of the company and the shareholders therein, and without first submitting those terms to the shareholders of the said company; and the plaintiff apprehends, and the fact is, that the proposed compromises will at once be carried through unless the defendants are restrained from so doing by the order of this honorable court. The danger is in fact so imminent, that it is impossible for the plaintiff and those acting with him to call another meeting for the purpose of removing all the directors of the company from their office, or for any other purpose which might effectually stop the said compromises, in time to prevent their being carried out; and even if such another meeting could be convened in time, the defendants, by the same proceeding as they adopted at the meeting of the 14th day of October, would be again able to break up and would succeed in breaking up the said meeting by improperly deciding that it was adjourned by a mere show of hands held up by a few friends or nominees of the said directors who are interested in putting an end to all further investigation into the aforesaid matters.”

The bill prayed for a declaration that the refusal to grant a poll on the question whether the meeting should be adjourned at the meeting of the 14th of October was illegal and improper, and for an injunction to restrain the directors from concluding any arrangements with respect to legal proceedings commenced or to be commenced against the vendors of the property to the company, or with any other persons, until such arrangement, if proposed, should have been submitted to the shareholders in the company, and

should have been approved of by them ; and for a *dec- [19 laration that Gardiner had ceased to be a director, and might be restrained from acting as such director, or that a meeting of the shareholders should be summoned for the purpose of submitting the plaintiff's resolutions to them.

At the time the bill was filed a petition to wind up the company was pending, and until it was heard, which was not till April, all proceedings in the suit were stayed. The petition having been dismissed, Colonel Gardiner demurred.

The Vice-Chancellor overruled the demurrer, and from this decision the demurring defendant appealed.

Higgins, Q.C., and Wintle, for the appellant : The bill is demurrable on two grounds. In the first place, the bill ought to have been in the name of the company. This rule has been established by *Mozley v. Alston* ⁽¹⁾, *Foss v. Harbottle* ⁽²⁾, and was followed in *Gray v. Lewis* ⁽³⁾. If such a bill is filed, and the majority of shareholders disapprove of it, they may bring the litigation to an end by passing a resolution to that effect, and the court will then order the bill to be taken off the file : *Exeter and Crediton Railway Company v. Bulter* ⁽⁴⁾. The only exceptions to this rule are stated by Mr. Justice Lindley in his work on the Law of Partnership ⁽⁵⁾. One exception is where some fraud has been committed by the directors in the name of the company, or where the company is attempting to do something *ultra vires* : *Clinch v. Financial Corporation* ⁽⁶⁾. The other exception is where the course attempted to be pursued by the company is injurious to one particular class only of the shareholders, as in *Atwood v. Merryweather* ⁽⁷⁾. And even in that case, if the matter complained of by the minority is within the legitimate power of the majority the court will not interfere. For the court will not interfere with the internal management of the company : *Bailey v. Birkenhead, Lancashire and Cheshire Junction Railway Company* ⁽⁸⁾. The present bill comes within neither of these exceptions.

In the second place, there is nothing in the allegations in the bill to show a title to relief. The only thing complained of is the *ruling of the chairman as to the adjournment [20 of the meeting. If the court will go into that question, we contend that the ruling was quite right. The adjournment is to be made "with the consent of the meeting," and that must mean with the consent of those present at the meet-

⁽¹⁾ 1 Ph., 790.

⁽²⁾ 2 Hare, 461.

⁽³⁾ Law Rep., 8 Ch., 1035.

⁽⁴⁾ 5 Railw. Ca., 211.

⁽⁵⁾ 3d ed., p. 935.

⁽⁶⁾ Law Rep., 5 Eq., 450.

⁽⁷⁾ Ibid., 464, n.

⁽⁸⁾ 12 Beav., 433.

ing: *Reg. v. Vestry of St. Pancras* ('); *Reg. v. Hedger* ('). A poll means a reference of the question to the whole of the constituency, which would be absurd in such a case, for the meeting would have to be adjourned for the purpose of taking it: *Reg. v. Cooper* ('). It is also clear that where the votes are taken at a meeting, the votes are to be counted by number of shareholders and not by number of shares; for the 51st clause of the articles says that in case of equality the chairman is to have a "second, or casting vote," which would not apply to the case of the chairman having a number of votes according to his shares. Again, according to the plaintiff's own showing it was impossible for him to have carried his resolutions at that meeting, for he only gave notice of a resolution requesting Colonel Gardiner to resign, not of a resolution removing him from his office; and as Colonel Gardiner was not present, nothing could be done.

[MELLISH, L.J.: In a late case in bankruptcy, *Ex parte Till* ('), a doubt was suggested as to the mode of voting for the adjournment of a meeting of creditors, but it was not necessary to decide the question.]

Glasse, Q.C., and *Robinson*, Q.C., for the plaintiff: We admit the rule laid down by *Mozley v. Alston* ('), but we contend that this bill falls within the exceptions to the rule. In the first place, the plaintiff complains that he and those who act with him, although really in the majority, are overborne by the collusive conduct of the directors and their friends. The defendants are, in fact, acting *ultra vires*. It is exactly similar to *Atwood v. Merrybeather* ('). If the plaintiff is in a minority, the bill comes within the other exception illustrated by *Menier v. Hooper's Telegraph Works* ('), where it was held that where the *majority are acting oppressively to the minority, one shareholder who is injured may file a bill on behalf of himself and others. In this case some of the members have been denied their rights by the directors who control the company, for it is clearly a right of the members to have a poll if they demand it: *Campbell v. Maund* ('). In fact the meeting was adjourned, but we say it was done illegally, and we have, therefore, a right to file a bill in the name of the shareholders, on the ground that it is to be taken for granted that the shareholders do not approve of an illegal act: *Williams v. Salmon* ('). The chairman, as we contend, acted in distinct

(') 11 A. & E., 18.

(') 12 A. & E., 139, 151.

(') Law Rep., 5 Q. B., 467.

(') Law Rep., 10 Ch., 631.

(') 1 Ph., 790.

(') Law Rep., 5 Eq., 464., n.

(') Law Rep., 9 Ch., 350.

(') 5 A. & E., 865.

(') 2 K. & J., 463, 469.

violation of the 51st article. We do not say that the poll should have been taken of the whole body of shareholders, but a poll should have been taken in the room of those present by themselves and their proxies, reckoning by shares and not by heads.

Therefore, if the court is against us on the frame of the suit, we ask for leave to amend by making the company a complainant instead of a defendant. Since the commencement of the argument on the appeal the plaintiff has been elected a director, and the old directors have resigned; and so far he has obtained the object of the suit (*). But it is necessary to obtain the opinion of the court as to the power of the chairman to adjourn the meeting without a poll.

JAMES, L.J.: I am of opinion that this demurrer ought to be allowed. I think it is of the utmost importance in all these companies that the rule which is well known in this court as the rule in *Mozley v. Alston* (*) and *Lord v. Copper Miners' Company* (*) and *Foss v. Harbottle* (*) should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent—unless there is something *ultra vires* on the part of *the company *quâ* company, or [22 on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done. If the majority of the company really are in favor of any particular shareholder who has been interfered with improperly, by misconduct of a director, by misconduct of a chairman, by miscarriage of a meeting

(1) On the 10th of November, 1875, the ordinary general meeting of the company was held, at which Colonel Gardiner and the rest of the directors resigned their

office, and a new body of directors, including the plaintiff, were appointed.

(*) 1 Ph., 790.

(*) 2 Ibid., 740.

(*) 2 Hare, 461.

or of certain shareholders at a particular date—if the company think that any shareholder has anything which ought to be made the subject of complaint, there is never any difficulty whatever arising from the apparent possession of the seal by the directors, or from any such cause, in filing a bill in the name of the company, if the majority of the company desire it to be filed. Any one of the shareholders might have filed his bill in the name of the company, and then if the directors had said, “You are not the company; the majority do not act with you, but with us”—the court would, as it has done in other cases, have taken the means of ascertaining which party it is, the plaintiff’s or defendants’, which really represents the majority of the company.

Everything in this bill, as far as I can see, if it is wrong is a wrong to the company, because every meeting that is called must be for some purpose or other—it must be for the purpose of doing or undoing something which is supposed to accrue for the benefit of the company. Whether it ought to have been done, or ought not to have been done, depends upon whether it is for the good of the company it should have been done, or for the good of the company it should not have been done; and, putting aside all illegality on the part of the majority, it is for the company to determine 23] whether it is for the good of the company that the *thing should be done, or should not be done, or left unnoticed. I cannot conceive that there is any equity on the part of a shareholder, on behalf of himself and the minority, to say, “True it is that the majority have a right to determine everything connected with the management of the company, but then we have a right—and every individual has a right—to have a meeting held in strict form in accordance with the articles.” Has a particular individual the right to have it for the purpose of using his power of eloquence to induce the others to listen to him and to take his view? That is an equity which I have never yet heard of in this court, and I have never known it insisted upon before; that is to say, that this court is to entertain a bill for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinions *vide voce* at a meeting of the shareholders. If so, I do not know why we should not go further, and say, not only must the meeting be held, but the shareholders must stay there to listen to him and to be convinced by him. The truth is, that is only part of the machinery and means by which the internal management is carried on. The whole question comes back

to a question of internal management ; that is to say, whether the meeting ought or ought not to be held in a particular way, whether the directors ought or ought not to have sanctioned certain proceedings which they are about to sanction, whether one director ought or ought not to be removed, and whether another director ought or ought not to have been appointed. If there is some one managing the affairs of the company who ought not to manage them, and if they are being managed in a way in which they ought not to be managed, the company are the proper persons to complain of that. It seems to me, therefore, that the thing is perfectly plain and obvious, and when the Master of the Rolls had the case before him he immediately pointed it out, and said, "You have the wrong plaintiff here—the plaintiff must be the company." From the first opening of this case before us, I have never had any doubt in my own mind that this was a bill which, if it was to be sustained at all, could only be sustained by the company.

But then the plaintiff says, "Give us leave to amend." It is rather late to ask for leave to amend when the amendments might *have been obtained from the Master of [24 the Rolls before any costs had been incurred. But the question is, is there anything substantial in this case on which we should give leave to amend on the part of the company? I can see nothing. I do not think we ought to give leave to amend for the purpose merely of getting a declaration as to what the proper mode of dealing with the adjournment was, because that would be simply to give a declaration without any relief. The company cannot file a bill saying, "Tell us the meaning of the rules, and what is to be done under them." They must find that out for themselves in the best way they can. We do not sit here to express an opinion on something which may lead to no practical result. I am not aware that there could be any practical result following upon a declaration obtained by the company as to the particular mode in which the meeting ought to have been adjourned, or in what particular way the meetings in future should be adjourned. If there is any doubt about it, if they cannot satisfy themselves as to the way of doing it out of doors, they must call a meeting and make it clear what is the mode in which they wish and propose to have it done.

Then, as to the rest of the relief prayed, that the directors were not to do something without the consent of the shareholders. Of course they cannot do so, and the shareholders can always call meetings if they please. Then, as to the

part of the prayer which asks that somebody else shall be restrained from acting, that is in truth given up—it is admitted at the bar that these resolutions could not have been properly put at the meeting.

It seems to me, therefore, that upon the allegations of this bill there really is no relief which the company can ask for and which we could give the company. We happen to know that the party of the plaintiff is now in full possession of the company, and the company will, no doubt, do what is right according to his view.

The demurrer must be allowed, with the usual consequences, and without leave to amend.

MELLISH, L.J.: I am of the same opinion. I think it is a matter of considerable importance rightly to determine this question, whether a suit ought to be brought in the 25] name of the company or in the name *of one of the shareholders on behalf of the others. It is not at all a technical question, but it may make a very serious difference in the management of the affairs of the company. The difference is this: Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them—some directors may have been irregularly appointed, some directors as irregularly turned out, or something or other may have been done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation.

In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be ad-

hered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the cases of *Mozley v. Alston* ⁽¹⁾ and *Foss v. Harbottle* ⁽²⁾. In my opinion that is the rule that is to be maintained. Of course if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and there [26 the minority are entitled to come before this court to maintain their rights; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set that aside, or to institute a suit in Chancery about it, except the company itself.

BAGGALLAY, J.A.: The matters complained of by this bill, and in respect of which relief is sought, are two in number—the one the refusal of the chairman at the meeting on the 14th of October to grant a poll, and the other that certain arrangements are in contemplation by the directors which may have a prejudicial effect upon the shareholders generally. As regards the first of these two matters, a declaration is asked that the refusal to grant a poll was illegal, and two alternative forms of relief are prayed consequent upon such declaration—the one that the resolutions which were passed at the meeting held under the presidency of the plaintiff after the original chairman had retired were valid and binding; the other that a meeting should be called under the direction of the court for the purpose of having those resolutions submitted to the meeting so called.

Now, as regards the former of those two alternatives, I think it was very wisely and properly abandoned in the course of the argument, because one of two things is clear—either that the second meeting of the 14th of October was a continuation of the former one, or an original and independent meeting; if it was a continuation of the former one, the only proper proceedings which could have been taken would have been to have treated the declaration of the former chairman that the meeting was adjourned as a nullity, and to have directed a poll to be taken on the subject of adjournment; if, on the other hand, it is regarded as an original meeting, it was not summoned in manner provided by the

⁽¹⁾ 1 Ph., 790.

⁽²⁾ 2 Hare, 461.

articles, and the resolution passed could not be binding. The other alternative form of relief seems to me to be such as this court is not in the habit of granting, namely, to direct a meeting to be called in order that at that meeting certain resolutions should be submitted. I am not prepared to say that a case for calling a meeting may not arise, 27] *particularly when the court desires to have for its own information the views of the shareholders. Meetings have been directed even where the company is not in course of liquidation, but such a course of proceeding is not usual, and certainly I am not aware that any such case has ever occurred when the calling of a meeting is within the power of the shareholders themselves.

Then if you get rid of these two alternative forms of relief, what becomes of the first paragraph of the prayer, which merely asks a declaration that the view taken by the chairman was illegal and improper, and asks a declaration to that effect with no consequential relief? I apprehend that it is not the practice of the court to make declarations of so utterly useless a character as is there asked.

But that leaves the second paragraph of the prayer to be considered. Now that is based upon an assumed intention on the part of the directors to enter into certain arrangements which may be prejudicial to the shareholders. But what is the real fact? If you turn to the articles you will find that there the fullest possible powers are given to the directors not only to manage the affairs of the company, but to commence, prosecute, continue or discontinue, any litigation that is pending, and it is proposed to ask the court to make a declaration that those articles are to be overborne by a further rule or declaration of the court that the directors are not to act without the shareholders' consent, and that a restriction which the shareholders have themselves waived is to be supplemented by the order of the court. It appears to me, therefore, that not in respect of any one of the several species of relief asked by this bill could relief be given by whomsoever the bill is filed.

I entirely concur in the views expressed by the Lords Justices, that as far as regards the constitution of this suit, even if the allegations formed the subject-matter for a suit in this court, the proper parties are not plaintiffs. I entirely concur in the views expressed by them, and in the reasons assigned. I should certainly have been disposed to have assented to the proposition to give leave to amend the bill had I thought that by amendment of the bill a fair case for 28] the intervention of this court could *have been made,

but being perfectly satisfied, for the reasons I have just mentioned, that the allegations of the bill, apart from the parties who may happen to be plaintiffs, are not such as this court could act upon, I am of opinion that it would be most idle to give leave to amend.

Solicitors: *Bischoff, Bompas & Bischoff; Valpy & Chaplin.*

See *ante*, p. 400 note.

[Law Reports, 1 Chancery Division, 30.]

C.A., Nov. 15, 1875.

BERESFORD V. BROWNING ().

[30

[1861 B. 303.]

Partnership—Agreement as to Share of deceased Partner—Join: and Several Liability.

By an agreement between A., B., C. and D., four partners in a mercantile business, after reciting, amongst other things, that all the partners had considerable sums of money employed in the business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business immediately after the retirement or decease of either of them, it was agreed between and by A., B., C. and D., that in case of either of them retiring from the copartnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner should not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said copartnership business immediately, but the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), should be repaid out of the business by the continuing or surviving partners by instalments, as therein mentioned, until the whole amount should be fully paid or discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they were to be at liberty to do:

Held (affirming the decision of the Master of the Rolls), that the agreement was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and was not intended to alter the nature of the liability, which remained joint and several.

Wilmer v. Currey (*) considered.

THIS was an appeal from a decision of the Master of the Rolls (*).

*On the 20th of February, 1855, an agreement was entered into between James Browning, William Browning, Henry Browning and Francis Browning, who were carrying on business in partnership as oil merchants, by which it was agreed that they should continue to carry on the business under the firm of James, William, & Henry Browning & Co., and that the profits should be divided between them in the following shares, namely: four-twelfths to James, three-twelfths to William, three-twelfths to Henry,

(¹) Affirming *ante*, p. 494.

(²) Law Rep., 20 Eq., 564; *ante*, p. 494.

(*) 2 De G. & Sm., 347.

and two-twelfths to Francis. And after reciting that all the partners had considerable sums of money employed in the business as floating capital which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business after the retirement or decease of either of them, it was agreed between the partners as follows: "That in case of either of them retiring from the copartnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner shall not be compellable by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said copartnership business immediately, but the clear balance as ascertained from the last stock-taking due to such retiring or deceased partner, together with any additional capital (if any), shall be repaid out of the business by the continuing or surviving partners in manner following (that is to say): the sum of £2,000 and interest at £5 per cent. per annum on the whole sum which shall be found due shall be paid at the end of one year from such retirement or decease as aforesaid, and the like sum of £2,000 shall be paid at the end of each next succeeding year with interest at £5 per cent. as aforesaid on the balance of the capital, until the whole amount shall be fully paid and discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they are at liberty to do. Lastly, it is understood and agreed that upon the death of either of the said partners during this copartnership, the last stock-taking of the said firm shall be conclusive as to the share or amount of interest of the deceased partner in the said business, and shall be the sum to be paid to his executors, in the proportions and at the times before mentioned, as in the case 32] *of retirement of any partner, with interest thereon from the date of such stock-taking at the rate of £5 per cent. per annum in lieu of profits from that time, and without any deduction in respect of bad debts (if any) to accrue between the time of such stock-taking and the day of the decease of such partners so dying as aforesaid: provided always, and it is hereby expressly agreed and declared, that in case at the time of the death of either of the said parties to these presents the stock shall not have been taken in the usual manner at the end of the month of June or during the following July, or the same having been taken shall not have been duly made up and signed by the said parties hereto, or a majority of them, on or before the 31st day of Decem-

ber following, or afterwards by all of them, that then, in the event of decease of either of the said partners between the 31st day of December and the 30th day of June following, the stock shall be taken afresh, and the executors or administrators of the deceased partner shall be entitled to his share of the profits of the said business from the then last proper stock-taking, such share to be duly ascertained, and the amount of the share of the deceased partner shall be paid to the executors of the deceased partner at the times and in the proportions before mentioned; but in the event of the decease of either of the said partners between the 30th of June and the 31st day of December in any year, the stock having been previously duly taken at the usual time, but not carried out into the books and signed, the surviving partners shall be allowed thirty days from the day of the deceased partner's death to complete the stock-taking, and the executors of the deceased partner shall be bound thereby, and in default of the surviving partners so completing such stock-taking so taken, but not carried out as aforesaid within the said space of thirty days, then the stock shall be taken entirely *de novo*, as from the last proper stock-taking duly entered in the books as before provided for, and the executors of the deceased partner entitled to his share of the profits at his death, and to be paid as before provided for."

James Browning died on the 22d of April, 1861, intestate. These suits were instituted for the purpose of administering his estate and taking the partnership accounts. A decree was made in both suits, and under an inquiry thereby directed it was *ascertained that the sum of £64,784 [33 15s. 7d. was due from William Browning, Henry Browning, and Francis Browning, in respect of James Browning's capital in the said business, and this sum was payable with interest at £5 per cent. by instalments of £2,000, payable on the 22d of April in each year. By the order made on further consideration, it was ordered that William Browning, Henry Browning, and Francis Browning, or the survivors of them, should pay the said instalments to the legal personal representative of the intestate within one calendar month after the 22d of April in each year.

Henry Browning died on the 3d of November, 1871, and William Browning on the 9th of March, 1872.

The instalments were regularly paid down to and inclusive of the instalment which became due on the 22d of April, 1874. On the 3d of May, 1875, Francis Browning, being unable to pay his debts, instituted proceedings in

the Bankruptcy Court for liquidation of his affairs by arrangement.

Under these circumstances the present petition was presented by the legal personal representative of James Browning, for the purpose of raising the question whether recourse could be had to the estates of Henry Browning and William Browning for payment of the instalments due and to become due; and it was arranged that this question should be argued and decided in the present petition without the institution of any supplemental suit.

The Master of the Rolls was of opinion that the agreement did not alter the nature of the liability of the surviving partners, which was several as well as joint, but only the mode of discharging it, and that the estates of Henry and William Browning were liable to the payment of the instalments. From this decision the representatives of Henry and William Browning appealed.

Waller, Q.C., and *Bunting*, for the appellants: We admit that the ordinary liability of a trading firm to an outside creditor is in equity several as well as joint, but this is not the case of an outside creditor. The agreement was made for the purpose of regulating the rights of the parties *inter se*; and these rights must be governed exclusively by that agreement, which only creates a joint liability on the sur-34] viving partners. If the *terms of the agreement are looked at, there is no personal liability to pay; the only agreement is that the share of the deceased shall be "repaid out of the business." The true construction of the agreement is, that surviving or continuing partners for the time being should alone be liable to pay the instalments out of the partnership assets. Partners are perfectly competent to enter into such an agreement, and it will be construed by courts of equity, as at law, as raising a joint obligation only: *Lindley on Partnership* (1); *Sumner v. Powell* (2); *Clarke v. Bickers* (3); *Wilmer v. Currey* (4). The last-mentioned case is so similar to this, that the Master of the Rolls, in deciding against us, virtually overruled it.

Chitty, Q.C., and *Ingle Joyce*, for the petitioners; and *Marten, Q.C.*, and *Grosvenor Woods*, for parties in the same interest, were not called on.

Horton Smith, for Francis Browning.

J. R. Griffith, for other parties.

JAMES, L.J.: I am of opinion that the decision of the Master of the Rolls was quite right. We must look at the

(1) 3d ed., p. 382.

(2) 2 Mer., 30.

(3) 14 Sim., 639.

(4) 2 De G. & Sm., 347.

substance of the contract in considering the construction of the instrument. The effect of it is, as the Master of the Rolls said, a contract between three partners and the executors of the fourth for the purchase of his share of the assets, they taking the goods in their character of partners. Although the price was to be ascertained in a particular way, the case is plainly within the rule that the liability of partners for property acquired by them as partners is in equity joint and several. That is the usual form of expressing the rule; but it would be more accurate to say that, so far as regards partners, where there is in equity no survivorship of property, there is in equity no survivorship of liability. Now if the executors of the deceased partner had adopted the same mode of ascertaining the value of the share of the deceased partner as that stipulated for in the *agreement—if they had said, We will take [35 the share according to the last stock-taking—beyond all doubt the ordinary rule of equity would have applied. In my opinion it makes no difference that it was arranged between the partners while they were all alive that, in case of the death of any, the executors should act in that way. I am of opinion that that is really the meaning of the arrangement, and that the language of the contract, so far from being inconsistent with that intention, is in favor of it.

It is said in the agreement that the share shall be paid “out of the business” by the surviving partners, which means that it is to be paid by them as partners; that is the only reasonable interpretation of the words; it is not to be paid by the partners equally, but they are to be liable for it as for any other business debt. If the partnership went on, and the debt was properly entered on the books, it would be entered as a debt from the firm to the estate of the deceased partner. I am, therefore, of opinion that the Master of the Rolls came to a right conclusion.

The case of *Sumner v. Powell* (1) has no bearing on this case; and with respect to *Wilmer v. Currey* (2)—which proceeded upon a dissolution of partnership, and a deed which imported a liability which the Vice-Chancellor considered an entirely new liability—whether the Master of the Rolls was right or not in thinking it was wrongly decided, as to which it is not necessary to give an opinion, it was a decision not applicable to a case like the present, in which the assets were handed over to the surviving partners.

MELLISH, L.J.: I am of the same opinion. At law and in equity the death of one of several partners puts an end

(1) 2 Mer., 30.

(2) 2 De G. & Sm., 347.

to the partnership, and in some cases the executors of the deceased partner are entitled to his share of the assets; they may have the assets sold, and the share realized at once. By the agreement in the present case it was stipulated, by a clause which, if the deed had been logically arranged, ought to have come first, that upon the death of either of the partners "the last stock-taking of the firm shall be conclusive as to the share or amount of interest of the deceased partner in 36] the said *business, and shall be the sum to be paid to his executors in the proportions and at the times before mentioned"—that is as the classes are arranged; more logically, it should have been "after mentioned." Putting this clause first, the agreement then says that if one partner retires or dies, the continuing or surviving partners shall repay the share as a debt ascertained from the last stock-taking by instalments. I think the Master of the Rolls was right in saying that this other clause does nothing more than postpone the payment of the debt. It was to be paid by instalments instead of at once. That this was the intention of the parties is, I think, confirmed by the fact that the clause applies to retiring partners in the same way as deceased partners. It says, "In case of either of them retiring from the copartnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner shall not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said copartnership business immediately." It is clear that in this clause at least the words "continuing partner" refer to the case of a retiring partner, and "surviving partner" to the case of a partner who dies; and then it goes on: "But the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), shall be repaid out of the business by the continuing or surviving partners in manner following," &c. I think that here the words "continuing" and "surviving" must have the same meaning as before, namely, that continuing applies to the case of a retiring partner, and surviving to the case of a partner who dies. That being so, all the surviving partners were liable at law for this debt. No doubt, if one of these survivors died, his executors could not at law be sued jointly with the then surviving partners. But that is only because the executors of a deceased partner never could be sued at law. But in equity they would be liable. Now, supposing one partner were to die, and then one to retire, he could

not by so retiring avoid his liability at law to the executors of the partner who had died. If this be so, I can see no difference in equity between the case of a retiring partner and one dying; and if one partner retiring does *not [37 cease to be liable at law, I think it clear that if one dies his estate cannot escape from liability—in other words, the liability is several as well as joint.

BAGGALLAY, J.A.: It appears to me that the authorities cited by the counsel for the appellant only establish the proposition that, where a liability arises from the instrument only, the extent of the obligation must be measured by the terms of the instrument only; and *Wilmer v. Currey* (') is not inconsistent with this view. Whether the Master of the Rolls was right or not in his explanation of the case, it appears to me that it does not vary the principle laid down in the other cases. The Vice-Chancellor there says ('): "The object of the suit is to enforce, not that different liability which would have existed independently of the deed, but the particular liability created by the deed, which would not have existed but for the deed." That is very different from the present case. In the present case there is no covenant, but a written agreement; although I do not mean to say that a different interpretation ought to be put upon a covenant and an agreement. Apart from the agreement, there was a joint and several liability on the surviving partners to pay to the executors of a deceased partner the value of his share of the assets, they taking all the assets of the partnership, and that obligation was that the value should be paid at once. As I read this agreement, it was only to allow the other partners to extend the payments over several years instead of paying the whole immediately, which might have been highly detrimental to the business. Great reliance was placed by the appellants on the words "continuing or surviving partners," which it was contended meant continuing or surviving from time to time when the instalments were payable. I think it is clear that the words refer to the time of retirement or death, so as to mean in the case of retirement the retiring partners, in the case of death the surviving partners.

Then it is said that the words "out of the business" mean that the executors are to look only to the assets of the business. Such *a contention seems very improbable having [38 regard to the smallness of the amount of each instalment, and still more if we bear in mind that the partnership was determinable at will. I think the clear object and meaning

(') 2 De G. & Sm., 347.

(*) 2 De G. & Sm., 352.

of the agreement is, that in consideration of the executors leaving the whole share of the assets in the business, the value was to be paid by the partners by instalments instead of in one sum. And when we consider the fact that the shares of the partners were unequal, this view of the construction is confirmed. The appeal must be dismissed with costs.

Solicitors for appellants: *Walker & Battiscombe.*

Solicitors for respondents: *R. Smith; Austin, De Gex & Harding.*

[Law Reports, 1 Chancery Division, 52.]

V.C.M., Nov. 11, 1875.

52]

*RAWLINSON V. MILLER.

Partition Act, 1868—Decree in County Court—Sale before further Consideration, notwithstanding Inquiry as to one of the Parties interested.

By a decree for administration in a County Court a sale of real estate devised to A. and six other persons parties to the suit was ordered, and an inquiry was directed before the Registrar of the court as to A., who had not been heard of for many years. On an affidavit being produced to the Registrar showing that A. had not been heard of for seventeen years, the sale was effected without any certificate as to the result of the inquiry being made. The sale produced more than £500, and the cause was transferred to the Court of Chancery.

On motion by the purchaser to be discharged and to have his costs paid, on the ground that the sale was invalid as having been made before a certificate in answer to the inquiries had been made :

Held, that A. must be presumed to be dead without issue; and that, as all parties interested were in fact before the court at the hearing, and were willing to convey, and a good title could be made independently of the Partition Act, 1868, the purchaser was bound to accept such a title, and could not rely upon the technical informality in the decree.

THIS was a suit instituted by an equitable plaint in the County Court of Lincolnshire, and transferred into the High Court of Chancery on the ground that the subject-matter of the suit was above the County Court limit.

William Wood, by his will, dated the 14th of January, 1844, gave and devised to his wife, Elizabeth Wood, all his real and personal estate and effects, whatsoever and where-soever the same might be, for and during the term of her natural life, and after her death he gave and devised the same unto and equally amongst his children, whom he named and who were seven in number, their heirs and assigns, forever, as tenants in common.

William Wood died on the 16th of March, 1845, and his wife died in 1863.

Of the seven children, three sons emigrated to America more than twenty years ago, and settled at Burlington Flats,

Oswego county, New York, where two of them, who were plaintiffs in the plaint, continued to reside. Samuel Wood, the other of the three, *left Burlington Flats about [53 seventeen years ago for California, and had never been heard of since, though inquiries had been made respecting him; and from his previous habits it was believed by the family that he would not have remained long without communicating with them if he had been alive.

The plaint was for the administration of the testator's estate, and sought, besides taking certain accounts, to have his real estate sold, and the proceeds divided amongst the children. It also prayed for a partition.

All the six remaining children were either plaintiffs or defendants to the suit, and a majority of them desired to have the real estate sold.

On the 7th of November, 1874, an order was made on the hearing of the plaint, and in the presence of all the six children, to the following effect:

"1. That the property shall be sold by and under the direction of the court.

"2. That the proceeds of the sale, after providing for the costs of all parties incidental to this suit, shall be divided amongst the parties entitled.

"3. That it be referred to the Registrar that proper inquiries may be directed with reference to Samuel Wood."

The matter then went before the Registrar, and an affidavit of one of the testator's sons was brought in, which proved the above-mentioned facts as to the disappearance of Samuel Wood, and thereupon the real estate of the testator, which consisted of certain house property subject to a mortgage term of 1,000 years, was sold by the direction of the Registrar without any certificate being made or the cause being brought into court for further consideration. The sale produced more than £500, and the cause was in consequence transferred to the Court of Chancery.

The purchaser took out a summons in Chambers to annul the sale, on the ground that it was invalid, as having been made under the Partition Act, 1868, under a decree which left it to the Registrar to find whether all the parties interested in the estate were before the court, and before any certificate as to the result of the inquiries.

*The summons was refused in Chambers, and the [54 purchaser now moved to discharge the order refusing it.

Higgins, Q.C., and *Methold*, for the purchaser: *Peters v. Bacon* ('), so far as it supported the view that a sale might

(') Law Rep., 8 Eq., 125.

be made under the Partition Act before further consideration when all the parties interested were not before the court at the hearing, has been overruled by later decisions; and it is now settled by *Powell v. Poxell* ⁽¹⁾ that the effect of the 9th section of the Partition Act is, that, whenever in a partition suit inquiries are directed by the decree as to the parties interested, the result of the inquiries must be certified before the sale is made. This view was followed in the case of *Mildmay v. Quicke* ⁽²⁾. Moreover, a title cannot be made by the mortgagee, who has only a chattel interest in the property.

Glasse, Q.C., and *Cozens-Hardy*, for the plaintiffs in the suit: The facts proved by the affidavits showed conclusively that there was a legal presumption that Samuel Wood was dead when the suit was instituted. There was also a presumption that he was dead without leaving issue: *Doe v. Griffin* ⁽³⁾; *Doe v. Wolley* ⁽⁴⁾. Therefore every person interested was before the court at the time the decree for a sale was made; and there was nothing to prevent an absolute decree for a sale being made at the hearing.

[They also relied upon the conditions of sale as precluding the purchaser from taking the objection.]

Higgins, in reply.

MALINS, V.C.: This is an objection to a title of a most technical nature, and one unworthy of the occupation of the time of this or any other court.

[His Lordship then stated the effect of the will, and continued:]

There were seven children. One of them went to America 55] *nineteen years ago, and has not been heard of for seventeen years. There is therefore a presumption that he died without issue, no one having claimed to be his child. The consequence is that his real estate vested in his eldest brother as heir-at-law.

In that state of things, nothing would be more easy than to sell the real estate under a simple condition, providing that the vendors should not be put to prove strictly the death of Samuel Wood without issue.

To resort to the court for a sale of the real estate was quite unnecessary. However, the suit was instituted, and a decree made, which, it is true, was not in proper form. But the decree having been made, an affidavit was brought in showing that Samuel Wood had not been heard of for seventeen years, and that his habits were such that he would

⁽¹⁾ Law Rep., 10 Ch., 130.

⁽³⁾ 15 East, 293.

⁽²⁾ Law Rep., 20 Eq., 537.

⁽⁴⁾ 8 B. & C., 22.

have communicated with his friends if he had been living. This was quite sufficient to allow the presumption that he was dead ; and the decree was in fact made in the presence of all interested parties.

Although I am sorry to find that a good deal of technicality has been introduced into the construction of the Partition Act, and I think it desirable to get rid of technicalities as far as may be, I cannot think it possible that such an objection as this can be sustained when all parties interested are really before the court, and a perfectly good title can be made independently of the act.

A very similar point arose in *Cavendish v. Cavendish* (¹), in which my decision was affirmed on appeal, and it was held that, though it appeared that a title could not be made strictly in accordance with the decree, yet inasmuch as a good title could in fact be made, it would be enforced against the purchaser. In that case there was some difference between the title stated and that actually proved ; but I had all the parties before me who could set that right ; and in the Court of Appeal a slight alteration was made in the mode of dealing with the purchase-money, which took away every appearance of difficulty.

It was argued that the result of the inquiry ought to have been certified before the sale was made. But I have had many partition suits in which there has been no preliminary order before the sale was directed. If, for instance, I had four persons all interested *in fee simple, and all before [56 the court, I should not have made any inquiry. It would be a ridiculous thing to direct an inquiry when all parties interested are actually before the court ; and in this case it is now shown that the decree for the sale was made in the presence of all parties interested ; and if there is any technical error in the decree, it does not affect the purchaser if he can get a good title to the property purchased by him. What he is entitled to is to have a good title, and the court can unquestionably give him a good title by giving him a conveyance by all the parties interested.

Then it is said that he cannot have a title through the mortgagee, because the mortgage is only for a term of years. It is quite true that a purchaser cannot be forced to take a chattel interest in any property, however long the term, when he has contracted to buy the fee. But here the entire reversion may be conveyed. However, it is not necessary to go into this matter. It is sufficient to say that the decree

(¹) Law Rep., 10 Ch., 319.

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was made in the presence of all parties interested, and gives a perfectly good title.

Solicitors: *Sharpe, Parkers & Co.; Hicks & Son.*

As to presumption, that person not heard from is dead, see 1 Eng. Rep., 467 note; 18 Eng. Rep., 676 note.

Where one has been absent and unheard of for seven years, the presumption arises that he is then dead, but not that he died at any particular time theretofore. To raise the latter presumption, special facts and circumstances should be shown, reasonably conducing to that end. The evidence need not be direct nor positive; but it should be of such a character as to make it more probable that he died at a particular time, than that he survived. When one is known to be alive at a certain time, there is a presumption of the continuance of his life after that period which must be overcome by some sort of proof. Where one studious in habits, attentive to business, with a fixed and permanent residence and pleasant domestic relations, suddenly disappears, these facts may warrant a jury in finding his death at the time. In a suit brought about the year 1871 on a policy of life insurance, wherein the company put in issue the death of the assured, and set up the forfeiture of his policy by failure to pay a premium note which had matured June 8, 1861, it appeared in evidence that the assured was unmarried, and without a fixed place of abode; that he disappeared about March 1, 1861, from his boarding place at New York, with the declared intention of going to Brooklyn, and did not return; that he left behind clothes and a valise of no great value; that prior to his disappearance he had been in the habit of writing to his friends and relatives, but was not heard of afterwards; that he had lived for years in different states of the south, and had announced his intention of going thither to take up arms in her defence, and had expressed on the other hand no design of making his residence in New York. Held, that under such state of facts, although the assured had been unheard of for more than seven years, the proof was insufficient to raise a presumption of the death of the assured prior to the ma-

turity of the note, and the company could not be held: *Hancock v. American, etc.*, 62 Missouri, 26.

Where, when last heard from, one was in contact with some specific peril, this circumstance may raise a presumption of death without regard to the duration of the absence. But other circumstances may create the same presumption, as where the circumstances of the disappearance are more consistent with the theory of death than that of a continuance of life, when considered with reference to those influences and motives which ordinarily govern men; in either of which cases the jury may infer death at any time, within the seven years, such as may seem to them most probable.

In a suit on a life insurance policy, it appeared that the assured, who was an unmarried man of about forty years of age, took passage at Chicago for Detroit on a lake steamer bound for Buffalo; that on the voyage he seemed to be sick and despondent; that while the vessel was in Lake Huron he was seen in the evening on the guard, and leaning out through a "shutter" in the bulwark of the boat, which opened upon the water; that on landing at Detroit ineffectual search was made for him, but in his stateroom were found his coat, hat and valise; that some five or ten minutes after landing at Detroit the master went on shore and stood at the gangway, but did not see the assured go ashore nor hear anything of him; the boat had landed at way stations, but the master was on deck during the whole of the time but did not see the assured get off, and testified he could not have gone ashore there without having been seen by him. Held, that the testimony was amply sufficient to show that he was brought in contact with a specific peril, and to raise the presumption of his death by drowning; and that such state of facts also raised the presumption that his death was the result of accident: *Lancaster v. Washington Life Ins. Co.*, 62 Missouri, 121.

Where two persons perish in the same

event there are no presumptions of law as to survivorship, unless prescribed by positive enactment. The presumptions of law as to survivorship prescribed by the Civil Code of Louisiana, where two persons perish in the same event, only apply in the absence of circumstances of the fact, and where the persons are respectively entitled to inherit from one another.

Where a male sixty-eight years of age, and a female forty-four years of age, respectively entitled to inherit from one another, perish in the same event, the presumption raised by article 939 of the Civil Code of Louisiana, in the absence of circumstances of the fact, is, that the male perished first.

Where the title of the plaintiff who seeks to disturb the possession of others depends on the fact that the person under whom he claims survived

another, though both perished in the same event, and the case admits of no presumptions of law, the burthen of proof is on the plaintiff to establish the fact of survivorship. If it appear that both persons perished at the same instant, or if it shall be impossible to declare from the evidence which perished first, the plaintiff must fail. But the fact of such survivorship does not require any higher degree of proof than other facts in a civil case: *Robinson v. Gallier*, 2 Wood's U. S. Cir. Ct. Rep., 178.

The law presumes, it seems, in the absence of any evidence, that every married person has issue, though in some cases after a married woman has arrived at a considerable age without having children the contrary rule obtains: 13 Eng. Rep., 677 note.

[Law Reports, 1 Chancery Division, 61.]

V.C.B., Nov. 4, 5, 13, 1875.

*WHITFIELD V. LANGDALE.

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[1873 W. 13.]

Will—Falsa Demonstratio—Acreage “more or less”—Parcel—Occupation.

Testatrix, in exercise of a power in a marriage settlement, by will, dated in 1845, devised, “All that and those messuage or tenement, houses, buildings, farm and lands, called H. . . . situate in the parish of L., containing by estimation eighty acres more or less . . . now in the occupation of J. C. or his assigns,” to the use of the same J. C., his heirs and assigns.

At the date of the will, a farm called H. was in the occupation of J. C. It contained nearly 175 acres, of which about eighty-nine were freehold in the parish of L., about sixty-six were copyhold in the parish of L., and the remainder were copyhold in an adjoining parish;

Held, that not only the eighty-nine acres of freehold in the parish of L., but the whole of H. farm, passed by the devise.

Testatrix also devised “All that messuage or tenement, barn and lands thereunto belonging, situate in the parish of B. . . .” called by the name of “Claggetts and Sievelands,” to the use of J. W., his heirs and assigns.

This description was identical in terms with a description in a schedule to the settlement; and it was followed in the same schedule by descriptions of six other pieces of land. At the date of the will, and for many years before and after, all seven pieces of land were in one occupation, and known as “Claygate Farm.”

Held, that all seven parcels passed by the devise.

Testatrix also devised “All that capital messuage . . . and farm house, with the barns, buildings . . . gardens, orchards, lands . . . woods, wood-grounds and appurtenances . . . commonly called T. . . . situate in the parish of E. G., in the occupation of A. B., his assigns or under-tenants,” to the use of the same A. B., his heirs and assigns.

At the date of the will T. farm was situate in two parishes, E. G. and W. The

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farm house of T. was in W. Parish, and part of the farm buildings was in the parish of E. G. All were then in the occupation of A. B., except some woods which were kept in hand by the landlord, and never were in the occupation of A. B.:

Held, that the farm house, buildings, and all the lands of T. farm (except the woodlands, which fell into the residue), passed by the devise.

ADJOURNED SUMMONS. By the marriage settlement, 62] dated the 27th of May, 1844, of *Thomas Haire and Mary Ann Hick, all and singular the freehold hereditaments comprised in the 1st schedule, and all other the freehold hereditaments (if any) over which Mary Ann Hick had any power of appointment, were appointed and granted—and all and singular the freehold hereditaments comprised in the second schedule, and all other the freehold hereditaments (if any) of which Mary Ann Hick was seised or possessed, were granted and released—and all and singular the copyhold hereditaments comprised in the said 2d schedule, and all other the copyhold hereditaments (if any) of or to which Mary Ann Hick was seised or entitled, were covenanted to be surrendered—to the use of trustees and their heirs upon the trusts of the settlement.

Amongst the trusts of the settlement was a trust in the events, which happened, of Mary Ann Hick dying in the lifetime of Thomas Haire, and of there not being any issue of the marriage, to convey the trust property, subject to the life interest of Thomas Haire, in trust for such person or persons for such estates and interests as Mary Ann Hick should, notwithstanding coverture, by her will have given or devised the same; and in default of any such gift or devise, upon trust for Mary Ann Hick, her heirs and assigns.

The 1st schedule to the indenture contained descriptions of lands not affecting the questions now argued.

The 2d schedule was as follows: "All that capital messuage or tenement and farm house, and all those arable lands, tenements, meadows, feedings, pastures, woods, wood grounds and hereditaments whatsoever, commonly called or known by the name or names of Tickeridge and Shelves, or by whatsoever other name or names the same or either of them are or have been called or known, situate in the several parishes of East Grinstead and Westhoathly, or one of them, in the said county of Sussex, together with all and singular houses, edifices, buildings, barns, stables, gardens, orchards and tofts, parcel of or belonging to the said capital messuage or tenement and premises, or any or either of them, with their and every of their appurtenances. . . .

All which said capital messuage or tenement, farm, lands, hereditaments and premises, were formerly in the tenure or

occupation of Woodman and Fairhall, and are now in the occupation of William Woodman or his assigns.

*“And also all that farm called Hookland, and all [63 houses and buildings, lands, tenements and hereditaments, with the appurtenances, commonly called or known by the name of Hookland, or by whatsoever other name or names the same or any part or parcel thereof are, is, or have been called or known, situate in the parish of Lindfield, in the said county, containing by estimation eighty acres, more or less, formerly in the tenure or occupation of Thomas Penfold, but now of John Coppard or his assigns or under-tenants.

“And also all that messuage or tenement, barn and lands thereunto belonging, situate in the parish of Buxted, in the said county, called or known by the name of Claggetts and Sievelands.

“And also all that other messuage or tenement, barn, water corn-mill, lands, meadows, pastures, woods and underwoods, containing by estimation sixty acres, more or less, situate in the parish of Maresfield, in the said county.

(A.) “And also all that one parcel of land and wood-ground, with the appurtenances, in Buxted aforesaid, containing by estimation five acres and three roods of land, more or less, bounding to the highway leading from Poundgate to a messuage formerly of John Wilmshurst, the elder, to the north, to the lands called Claggetts to the south, and to the lands formerly of the said John Wilmshurst east and west.

(B.) “And also all that messuage or tenement, barn, garden, lands, tenements and hereditaments called or known by the name or names of Honies and the Bullets, or by whatsoever other name or names the same or any part thereof is or are called or known, with all and singular the appurtenances, containing in the whole by estimation sixteen acres, more or less, situate in Highurst Quarter, in the said parish of Buxted, and bounded by the highway there leading from the forest of Ashdown to Five Ashen Down towards the west, to the lands formerly Edward Wilson’s towards the south, and to the lands formerly Kilner’s, and afterwards Leader’s, to the east.

(C.) “And also one croft of land lying over against the said messuage called Honies, known by the name of the Little Croft, containing by estimation one acre.

(D.) “And also one other piece of land called Hawkin’s Croft, containing by estimation two acres, more or less, bounding to the *said highway leading from Ashdown [64

Forest to Five Ashen Down towards the east, and to the lands formerly of Goldsmith Hudson north, west and south.

(E. and F.) "And also all those two several pieces or parcels of land, with the appurtenances, containing in the whole by estimation eighteen acres, more or less, commonly called or known by the name of Ruspers and the Orknies, or by whatsoever other name or names called or known, situate in Buxted aforesaid, one parcel whereof, called the Ruspers, containing by estimation ten acres, and bounding to the highway towards the north and west, and to lands formerly of the said John Wilmshurst, sometime William Pettit's, towards the east, and the other parcel of land called the Orknies, containing by estimation eight acres, and bounding to the highway there towards the west, and to the lands formerly of the said John Wilmshurst, sometime the said William Pettit's, towards the south, and to the lands formerly Kilner's, and afterwards Leader's towards the east.

"All which said last-mentioned messuages, lands, tenements, hereditaments and premises, mentioned to be situate in the said parish of Buxted, were formerly in the tenure or occupation of John Durrant, and are now in the occupation of Isaac Gilbert or his assigns or under-tenants.

"And the said messuage or tenement, water corn-mill, lands, wood-grounds and premises mentioned to be situate in the said parish of Maresfield, were formerly in the tenure or occupation of John Newham, Esquire, and are now in the occupation of William Osborne or his assigns or under-tenants."

No surrender of the copyhold premises to the trustees of the settlement was made.

Mary Ann Haire duly made her will, dated the 13th of December, 1845, and thereby, after reciting the settlement, and in express exercise of the power, she devised as follows:

"I devise all that and those messuage or tenement, houses, buildings, farm and lands, with the appurtenances, called Hookland, or by whatsoever other name or names called or known, situate in the parish of Lindfield, in the said county, containing by estimation eighty acres, more or [65] less, formerly in the occupation of *Thomas Penfold, but now of John Coppard or his assigns, unto and to the use of the said John Coppard, his heirs and assigns, forever.

"I devise all that messuage or tenement, barn, and lands thereunto belonging, situate in the parish of Buxted, in the said county, called by the name of Claggetts and Sievelands, unto and to the use of my cousin Joseph Wontner, his heirs and assigns, forever.

"I devise all that capital messuage or tenement and farm house, with the barns, buildings, stables, gardens, orchards, lands, meadows, feedings, pastures, woods, wood-grounds, and appurtenances whatsoever, commonly called Tickeridge, or by whatsoever other name or names called or known, situate in the parish of East Grinstead, in the said county, in the occupation of William Woodman, his assigns or under-tenants, unto and to the use of the said William Woodman, of East Grinstead aforesaid, farmer, his heirs and assigns, forever.

"I devise all that farm and lands called Hill End Farm, situate in the parish of Maresfield, in the said county, unto and to the use of William Osborne, of Maresfield aforesaid, farmer, the tenant thereof, his heirs and assigns, forever.

"And as to all the residue of my real estate whatsoever and wheresoever, of or to which I am or may at the time of my decease be or become entitled in possession, reversion, remainder, or expectancy, or over which I have or may have power to direct or appoint, give, devise, or bequeath, I devise the same and every part thereof, with their appurtenances, unto and to the use of the said Mary Ann Langdale, her heirs and assigns, according to the nature and tenure thereof, respectively, absolutely, and forever."

Mary Ann Haire made a codicil to her will, which did not affect the present questions, and died on the 3d of May, 1854.

The bill was filed on the 15th of January, 1873, by Thomas Whitfield and Henry Percival Hart, the trustees of the settlement, against the Rev. John Langdale and Mary Ann his wife, the latter being the residuary devisee and legatee under the will, to have the trusts of the settlement carried into execution under the direction of the court.

*The questions were the following :

[66

1. *As to Claggett's or Claygate Farm, and Tickeridge :*

In the second part of the 2d schedule to the certificate were set forth the properties which the Chief Clerk had found to be those comprised in the above devise to Joseph Wontner. These consisted of twenty-five parcels of land, together 75A. 1R. 16P., which were headed in the schedule, "Freeholds ; Claygate Farm."

The defendants, the residuary legatee and her husband, sought to vary this finding by striking out from the schedule twelve of these parcels of land, containing together 38A. 18P., which, as they contended, were not included in the gift to Joseph Wontner, and fell into the residue.

These twelve parcels were identical with six parcels in the 2d schedule to the settlement, which are marked above with the letters A to F; and the contention of the applicants on this (the first) summons, was that the gift to Joseph Wontner was sufficiently answered by the lands which in the settlement were called "Claggetts and Sievelands," consisting of thirteen parcels, containing 37A. 38P. only, exclusive of the lands A to F.

The receiver of the rents, Mr. Baker, said that at the date of the will the above 75A. 1R. 16P., together with the 10A. 29P., fourthly below mentioned, making together about 85 acres, were occupied together as one farm. Mrs. Clifton, whose father, Isaac Gilbert, was tenant from 1814 to 1850, whose mother was tenant until 1871, and whose husband, Charles Clifton, was the present tenant, said that all that time they had been occupied as one farm. Other evidence on the subject is summed up in the judgment.

As to Tickeridge :

In the third part of the 2d schedule were set forth the lands which the Chief Clerk had found to be comprised in the devise to William Woodman. These were all headed "Freeholds," and comprised one parcel of land, 1A. 3R. 3P., headed "In the parish of East Grinstead;" seventeen parcels, together 85A. 14P., headed "Tickeridge Farm;" and twenty-two other parcels, together 116A. 2R. 24P., headed "In the parish of Westhoathly, Tickeridge." Of these latter, one, consisting of thirty-two perches, was described as "house and premises."

67] *The defendants, the residuary legatee and her husband, by the same (first) summons, sought to vary this finding by striking out of the schedule all the last mentioned twenty-two parcels, except the "house and premises;" their contention being that, with the exception of the farm house and premises, of which the farm house and part of the premises were in Westhoathly parish, the other and larger part of the premises being in East Grinstead, none of the lands in Westhoathly passed by the devise to William Woodman.

The evidence whereby it was shown that these properties (with the exception of the woodlands below mentioned)

were held in one occupation, is commented on in the judgment.

2. *As to Tickeridge and Hill End Farms :*

The Chief Clerk had set forth in the 6th, 7th, 8th, 9th, and 10th parts of the 2d schedule to the certificate, the properties which he had found to be comprised in the devise of the residue of the testatrix's real estate. The 6th part of the 2d schedule comprised two parcels of freehold land, making together 51A. 36P., described as "Tickeridge," in the parish of Westhoathly.

The trustees of William Woodman's will by a second summons sought to vary the certificate by striking out the properties comprised in the 6th part of the 2d schedule to the certificate, and inserting them in the 3d part of the 2d schedule; in other words, they claimed 51A. 36P. of Tickeridge Farm in Westhoathly parish, which the Chief Clerk had treated as having fallen into the residue.

The evidence went to show that these two parcels of land, being both woodlands, were kept in hand by Mary Ann Haire, and were never in William Woodman's occupation.

As to Hill End Farm :

The 8th part of the 2d schedule to the certificate comprised one parcel of freehold land in the parish of Buxted, called "The Wood," described as "wood," and containing 30A. 2R. 22P.

William Osborne, by the same (second) summons, sought to vary this finding by striking out this parcel from the 8th part of the 2d schedule, and entering it in the 4th part of the same *schedule, which contained descriptions of [68 lands which the Chief Clerk had found to be the properties comprised in the above devise to him (Osborne).

This piece of wood, like the former, had been kept in hand by the testatrix, and was never in Osborne's occupation.

3. *As to Hookland :*

In the 9th part of the 2d schedule were set forth five parcels of copyhold land, comprising 18A. 3R. 25P., described as situate "in the parish of Wivelsfield and manor of Southmallings Lindfield;" and in the 10th part of the same schedule were set forth eighteen parcels, comprising 65A. 3R. 29P. of copyhold land, described as situate "in the parish of Lindfield and manor of Balneth."

Charles Coppard, the heir-at-law and customary heir of John Coppard, by a third summons sought to vary the certificate by striking out the lands comprised in the 9th and

10th parts of the 2d schedule, and having them inserted in the 1st part of the 2d schedule, which comprised the properties which the Chief Clerk had found to be those that were devised to John Coppard in fee, being twenty-three parcels of land, comprising 88A. 3R. 16P. headed "Freeholds." These freeholds were all situate in the parish of Lindfield.

In other words, he contended that the copyhold portion of a farm, which at the date of the will was called Hookland, being nearly 175 acres in extent, rented of the testatrix and her father at one rent, passed with the freehold part of the same farm under the devise, though part of the copyhold portion was not in Lindfield, but in an adjoining parish.

4. *As to Claggetts:*

In the 7th part of the 2d schedule were set forth three parcels of land, called Honey's Gill, Honey's Field, and Honey's Wood, comprising 10A. 29P., headed "Freehold, in the parish of Buxted, Claygate Farm."

The trustees of the will of Joseph Wontner, by a fourth summons, sought to vary the certificate by striking out the properties comprised in this 7th part of the 2d schedule, and having them inserted in the 2d part of 2d schedule; their 69] *contention being that this portion of Claygate Farm also passed under the devise in the will to Joseph Wontner.

Kay, Q.C., and *Freeman*, for the defendants, the applicants on the first summons: As to Claggetts and Sievelands, we ask to exclude lands A to F in the settlement from the devise to Joseph Wontner.

If there is a subject which satisfies all parts of the description, that subject passes, and nothing more. It may be that one part of the description, standing alone, might include other lands than those which satisfy the whole description: such other lands will not pass. The devise speaks of "all that messuage . . . barn, and lands . . . situate at Buxted . . . called by the name of Claggetts and Sievelands." These words are identical with the description in the schedule, which, it is admitted, refers to the lesser quantity. No evidence is admissible to enlarge the meaning of these words. *Woodden v. Osbourn* (1); *Stone v. Greening* (2); *Hall v. Fisher* (3); *Doe v. Bower* (4); *Webber v. Stanley* (5); *Pedley v. Dodds* (6); *Bacon's Tracts* (7).

(1) Cro. Eliz., 874.

(2) 13 Sim., 390.

(3) 1 Coll., 47.

(4) 3 B. & Ad., 453.

(5) 16 C. B. (N.S.), 698.

(6) Law Rep., 2 Eq., 819.

(7) Page 76 (Rule 13).

In *Goodtitle v. Southern* (¹), which may seem to be the other way, the word used was "farm." In *Hardwick v. Hardwick* (²), the main description was "known by the name of . . ."

In this case the testatrix does not say all that "farm" or "estate," but all that "messuage or tenement."

A residuary devise is now as much a specific devise as any other.

As to Tickeridge, we claim everything in Westhoathly except the farm house and premises.

The testatrix may have wished to restrict her gift to W. Woodman of Tickeridge Farm to that part of it which lay in East Grinstead.

Jackson, Q.C., for Joseph Wontner's representative: The rule laid down in *Jarman on Wills* (³) is, that if the testator describes the subject of the devise as an entire subject, and *in terms of sufficient certainty, as his farm called A., [70 or his house in a particular place, or his B. estate, or the like, then, although he adds a clause descriptive of the whole, but which is true only of a part, the entire subject may pass: *Goodtitle v. Southern* (¹); *Hardwick v. Hardwick* (²).

This is not the case of a sale of land, and the strict rules which would apply to a contract are not applicable to a devise.

As to Tickeridge, if the defendants admit that the house in Westhoathly passes, they can scarcely exclude the farm in the same parish, of which it is the farm house: *Doe v. Earl of Jersey* (⁴).

Kay, in reply.

Jackson, Q.C., and *Millar*, for William Woodman's trustees, and William Osborne, the applicants on the second summons: The words of the devise in each case are wide enough to pass these woodlands: *Paul v. Paul* (⁵).

Jackson, Q.C., and *Laing*, for Joseph Wontner's trustees, in support of the fourth summons: These three parcels of land must go with the rest of Claygate farm.

Kay, Q.C., and *Freeman*, for the defendants, opposed the two last mentioned summonses: It is not Claygate farm that is devised; it is one "messuage or tenement, barn, and lands thereunto belonging, called Claggetts and Sievelands"—certain specific lands—whether in the same occupation as Claygate farm or not is immaterial.

(¹) 1 M. & S., 299.

(²) Law Rep., 16 Eq., 168.

(³) 3d ed., vol. i., p. 747.

(⁴) 1 B. & A., 550.

(⁵) 1 W. Bl., 255.

The woodlands do not answer the last part of the description—viz., “now in the occupation of John Coppard.” If that part of Tickeridge which is in Westhoathly passed because it was in the occupation of John Coppard, it follows that the woodlands, which were not in his occupation, did not pass; and if, as we say, the Westhoathly part of Tickeridge did not pass, the woodlands, which were part of Westhoathly, certainly did not pass.

71] **Swanston, Q.C., and W. Renshaw, for Charles Coppard, supported the third summons: The testatrix has given the whole of Hookland Farm, but she has added a line of falsa demonstratio at the end. She has described it as situate in the parish of Lindfield, whereas it was situate in that parish and in another; and she has described it as being “eighty acres, more or less,” whereas it was about 175 acres. The description “all that and those messuage or tenement, houses, buildings, farm, and lands, called Hookland,” if it stood alone, would admittedly carry all the reputed parts of a farm: Goodtitle v. Southern (1); and would let in evidence to show what those reputed parts were; and it is a rule without exception, that when there has been a clear gift of any entire property by general words, that gift cannot be cut down by erroneous numerical description. It is immaterial whether the error be in the number of acres, the number of pounds of rental, as in Down v. Down (2), or the number of pounds payable for quit rent, as in Roe v. Vernon (3). Error is more likely to creep into figures than into general description, and therefore the general description prevails, and the figures are rejected. Words of suggestion or affirmation (which these are, and not of restriction or limitation), cannot do away with the generality of a devise. But here, as to the acreage, strictly speaking, there is no inaccuracy; 175 acres is “more” than eighty—upwards of twice as much more; but, treating the phrase as being, according to common parlance, inaccurate, it cannot affect the generality of the former description.*

Of the force of the words “more or less” there is an example in *Harrison v. Hyde* (4).

The testatrix’s will seems to show two general intentions—one, that all lands in the same occupation should go together; the other, that they should go to the tenants who

(1) 1 M. & S., 299.

(5) 5 East, 51.

(2) 7 Taunt., 843, and see the argument, p. 348.

(4) 4 H. & N., 805.

were in occupation. Everything, therefore, in John Cop-pard's occupation would go to him.

Mr. *Northmore Lawrence*, for an incumbrancer.

**Kay*, Q.C., and *Freeman*, for the defendants, op- [72 posed: If there had been a simple devise of Hookland, and no more, there must have been an inquiry what was included in Hookland; and all that was in it would have passed. But where a farm is described by situation and acreage, that description must not be exceeded.

If the words following the gift of Hookland had not been words of limitation and restriction, they might possibly be treated as a *falsa demonstratio*; not otherwise: *Roe v. Vernon* (¹), referring to *Vicars Choral of Litchfield v. Ayres* (²); and see Lord Ellenborough's remark in *Doe v. Earl of Jersey* (³). In *Harrison v. Hyde* (⁴) it was five acres more or less; here it is eighty.

These particular eighty acres can be easily identified with a corresponding description in the settlement.

In *Winch v. Winchester* (⁵) Sir W. Grant, M.R., said that the effect of the words "more or less" had never been absolutely fixed by decision; and as there was in that case an additional vagueness arising from the use of the words "by estimation," he would not allow the purchaser any compensation. But there the difference was only five or six acres out of forty-one; and where, as in *Portman v. Mill* (⁶), the description was, "containing by estimation 349 customary acres or thereabouts, more or less," and 349 customary acres were found to be less by 100 than as many statute acres, it was held that the words would not cover so great a deficiency.

Swanston, in reply: The cases of *Winch v. Winchester* and *Portman v. Mill* are cases of contract, and have no application.

Waller, Q.C., and *Kingdon*, for the plaintiffs.

Nov. 13. BACON, V.C.: Several questions have been raised upon the summonses lately argued before me, whereby it is sought to vary the certificate of *the [73 Chief Clerk made in this suit. Each of them calls for a separate consideration, but each and all of them depend upon the construction of the will of the testatrix, Mary Ann Haire.

In considering that construction, regard must be had to the circumstances affecting the testatrix at the time when it

(¹) 5 East, 51, 65.

(²) Sir W. Jones, 435.

(³) 1 B. & A., 550, 557.

(⁴) 4 H. & N., 805.

(⁵) 1 V. & B., 375.

(⁶) 2 Russ., 570.

was made. She had married in the year 1844, and by the settlement then executed certain freehold and copyhold estates were settled upon trust (*inter alia*), in the event of there being no issue of the marriage (which event happened), for such purposes and for such estates as she should by will appoint. Two schedules formed part of the settlement, which schedules contained descriptions of the several estates and parcels therein comprised. In December, 1845, the testatrix made her will, in which she recited the settlement, and proceeded, in exercise of the power, to devise the several estates to which it extended. The decree in this suit ordered the execution of the trusts of the will, and directed an inquiry what properties were comprised in the settlement, and also an inquiry what properties respectively were comprised in the several devises and appointments as contained in the will.

These inquiries having been made, the conclusions stated in the certificate are the subjects of dispute between some of the specific devisees and the residuary devisee, who is also to be considered a specific devisee of all the estates which are not otherwise disposed of. It is contended by the former that the testatrix meant more than a strict literal construction of her words would express. The latter contends that, in construing the will, the court is bound to give effect to the words used as they stand, and that no interpretation beyond those words is lawful, and no extrinsic facts can be resorted to for the purpose of arriving at such interpretation.

Many cases have occurred in which the principles applicable to construction of wills, involving questions of a kind similar to those which arise in this case, have been considered. The difficulty and nicety of such questions have at all times been felt. Some of the most important of the cases have been referred to in the course of the argument, and although the particular expressions in other wills (which are never exactly similar to those in which subsequent questions have presented themselves) cannot be relied on as furnishing an infallible guide for the solution of further [74] questions, yet *rules have been laid down which the courts have at all times to regard as authoritative.

Thus it has been established as what must now, by reason of its antiquity, and of the observance which has been paid to it in many subsequent cases, be regarded as an axiom, that when a devise is made in terms which describe and apply specifically to a definite subject, the operation of that devise cannot be extended beyond the very terms in which it is expressed, nor can extrinsic evidence be resorted to for

the purpose of showing that something different from the description was intended by the testator.

There have, however, occurred cases in which the expressions of the devise have been ambiguous, or otherwise defective and uncertain. In such cases a new and different rule is required, and has been established. In the words of a recent decision by Lord Selborne in *Hardwick v. Hardwick* (¹), "If the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly, in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded." This latter rule—no less positive and cogent than that first mentioned—is by no means at variance with that primary rule of interpretation.

Upon the strength of this second rule, it has been argued that the words of the several devises which are now in question show that the testatrix meant more than would be comprehended within a narrow and strict interpretation of the words she has used; and reliance was placed upon Lord Selborne's decision in the above case, in which he reviewed, with most elaborate care and attention, the more important of the authorities applicable, more or less, to the question before him. It is unnecessary for me to refer to them more particularly, as all of them have been referred to in the argument before me. I cannot, however, discover in the judgment then pronounced any disposition on the part of that most learned and patient judge to depart from or to call in question the first rule to which I have adverted.

The case before Lord Selborne in his judgment admitted of the *application of the second rule. It arose upon [75 a devise in these terms: "All that my share and interest in the messuages, lands, and premises called or known by the name of the Dyffrydd and the Little Dyffrydd, situate in the parish of Kinnerley, in the county of Salop, now in the occupation of John Edwards." It had been ascertained by the Chief Clerk's certificate that "parts of the property described as Dyffrydd are situate in the parish of Llandisilio, in the county of Montgomery, and are, except where they respectively abut on the river Virnwy, surrounded by, and are thrown into, and form part of, inclosures in the parish of Kinnerley, in the county of Salop; there are no boundaries between such parts of the said lands in the said

(¹) Law Rep., 16 Eq., 168, 175.

two counties respectively. Such parcels of land in the parish of Llandisilio have for forty-one years been deemed and reputed and occupied as part of the lands and premises known as Dyffrydd, and were, at testatrix's death, in the occupation of John Edwards, the then tenant of the said property called Dyffrydd, and are now in the occupation of Thomas Jones, the present tenant of Dyffrydd." The question, therefore, was, whether the two closes in the parish of Llandisilio, which were misdescribed as to the actual locality, and "Paper Mill Meadow," which was misdescribed as to the tenant in whose occupation it was, passed under the devise of lands "called or known by the name of the Dyffrydd and the Little Dyffrydd, situate in the parish of Kinnerley, now in the occupation of John Edwards." Lord Selborne in construing the will considered that the leading words of description were the lands "called or known by the name of the Dyffrydd and the Little Dyffrydd," and that the testatrix, having by these leading words described the subsequent matter of the gift, went on to speak of the accidents of the situation and the state of occupation, but did not thereby diminish the effect of the description she had given of the subject of her devise, which was a compact estate, and he therefore decided that the whole of the lands passed.

In the present case, the inquiries directed by the decree have been duly made, and four summonses have been taken out disputing the findings in the certificate.

The first of these (following the order in the certificate) is that of Charles Coppard, the representative of John Coppard, one of the devisees, to whom the testatrix made the devise following: [His Lordship read the words of the devise of Hookland to John Coppard contained in the will, and continued:] By the certificate it was found that the properties comprised in this devise are set forth in the 1st part of the 2d schedule, comprising lands amounting in the whole to 88A. 3R. 16P. Of this finding Charles Coppard by his summons complains, and insists that the devise to John Coppard includes in addition the particulars set forth in the 9th and 10th parts of the 2d schedule. Such additional particulars consist of copyhold lands in the parish of Wivelsfield and manor of Southmalling, Lindfield, comprising 18A. 3R. 25P., and of other lands in the parish of Lindfield and manor of Balneth, comprising 65A. 3R. 29P., which admeasurements greatly exceed the amount of acreage mentioned in the said devise.

In considering this particular devise I am compelled to

refer to the settlement to which the testatrix refers in her will. The estate called Hookland is thus described: [His Lordship read the description of Hookland comprised in the 2d schedule to the settlement as above stated, and continued:] In the same settlement, but in a separate category, are described several copyhold estates of the testatrix: [His Lordship read the descriptions of the copyhold lands, tenements, and hereditaments described in the 2d schedule to the settlement above stated, and continued:] And these, or the greater part of them, are those lands which Charles Coppard seeks by his summons to have added to the parcels of which the certificate finds the devise of Hookland to consist. Now, it is certain that, at the date of the will, there was no farm and lands called "Hookland" in the parish of Lindfield, containing eighty acres, in the occupation of John Coppard. Evidence being therefore admissible, several witnesses have proved that there was a farm, part of which was in Lindfield and part in an adjoining parish, containing 175 acres, which farm was known as Hookland, and for sixty years past had been called by the name of that, and by no other name. One rent of £40 a year was paid for that entire farm, and receipts for such rent by the testatrix and her father, who preceded her in title, were produced. It was further proved that the lands mentioned in the 9th and 10th parts of the 2d schedule to the certificate (making up, with eighty acres in Lindfield, the whole *175 acres [77 of which Hookland consists) had, during the period before mentioned, been held with and as part of Hookland. Upon this evidence, which is uncontradicted, and which I see no reason for distrusting, I am of opinion that, notwithstanding the great difference in the admeasurement somewhat vaguely mentioned in the will, and the description of Hookland, which is plainly erroneous, the whole farm, consisting of 175 acres, passed to the devisee, John Coppard.

Following the order of the certificate, it is thereby found that the 2d part of the 2d schedule contains the particulars comprised in the devise to Joseph Wontner, which is in these terms: [His Lordship read the words of the devise to Joseph Wontner contained in the will, and continued:] The settlement mentions this property thus: [His Lordship read the description of the same lands as contained in the schedule of the settlement, and continued:] the terms in each instrument being almost identical. Of this finding the residuary devisee complains, and insists that the devise extends no further than to the lands called Claggetts and Sievelands, and seeks by the summons to have the certificate

varied by striking out certain parcels which were not part of Claggetts and Sievelands at the date of the settlement. This contention the residuary devisee rests upon the words of the devise, and upon the fact that it appears, from the settlement itself, and immediately following the description I have quoted, that the testatrix was possessed of other lands mentioned by descriptions which appear to treat them as being different from "Claggetts and Sievelands," of which other lands one is a parcel of land and wood ground "bounding . . . to the north to the lands called Claggetts," others called by the names of Honies and The Bullets, and several other appellations different from "Claggetts and Sievelands." The question being, then, as to what the testatrix meant by the messuage and lands called "Claggetts and Sievelands," on the part of the representatives of the specific devisee, Joseph Wontner, it is proved by the receiver of the rents and tithes of the parish of Buxted for the last thirty-four years, that the whole of the parcels in the 2d part of the 2d schedule have, during the whole period mentioned, been occupied together as one farm—have been known and described by the name of "Claggetts or Clay-78] gate Farm." *Elizabeth Clifton, the daughter of Gilbert, who was the tenant of the farm called Claygate at the respective dates of the settlement and of the will, and whose knowledge upon the subject extends over forty years, deposes to the latter effect, as does also another witness named Wildish, whose knowledge extends over sixty years. The witnesses also prove that the additional or different appellations of lands mentioned in the settlement did and do describe parcels which have at all times within their knowledge been held with and formed part of the Claggetts Farm, and that they were so held with the knowledge of the testatrix. The description in the will cannot, therefore, be said to fit with perfect accuracy that which the residuary devisee insists that Claggetts consisted of. Evidence being therefore admissible for the purpose of ascertaining to what subject the terms of the devise are applicable, it appears to me that the evidence I have referred to, being uncontradicted, must prevail, and that the finding of the certificate is in this respect quite correct.

And this principle must apply also to a summons by Wontner's representatives, by which they claim to have the parcels which the certificate has inserted in the 7th part of the 2d schedule added to the 2d part of the same schedule, for the evidence appears to me to establish that Honey's Gill, Honey's Field, and Honey's Wood form part of the tenement

which is described in the 2d part of the 2d schedule as Claygate Farm, and the certificate must be varied accordingly.

By the same summons of the residuary devisee she complains that the lands in the 3d part of the 2d schedule, and therein mentioned to be in the parish of Westhoathly, have been improperly included by the certificate in the devise made by the will to William Woodman. That devise is in these terms: [His Lordship read the words of the devise to William Woodman, as above, and continued:] The description in the settlement runs thus: [His Lordship read the description, and continued:] The settlement, it will be observed, speaks of hereditaments known by the name Tickeridge and Shelves, situate in the several parishes of East Grinstead and Westhoathly. The devise mentions only Tickeridge and the parish of East Grinstead. The residuary devisee has argued that the subject of the devise is clearly *defined by the reference to the parish [79 of East Grinstead. It is not disputed that the messuage which is called Tickeridge passed by that specific designation, although it is not situate within East Grinstead, but is in Westhoathly; but yet it is insisted that all the other lands situate in Westhoathly are not included in the devise, and the residuary devisee therefore seeks to have the certificate varied by omitting from the 2d schedule all the property of the testatrix in Westhoathly, except only the capital messuage called Tickeridge. The evidence of William Woodman, the son of the specific devisee, is to the effect that he has resided at Tickeridge Farm for more than fifty years; that it has, during all that period, consisted of 279 acres, of which 183 are in Westhoathly and eighty-six in East Grinstead; that the whole of the farm-house is in Westhoathly, but the great portion of the farm buildings is in East Grinstead; and that it was so occupied by his father. A laborer named Thomas Simmonds, who has known the farm from his childhood, and who has worked upon it for twenty-four years, deposes to the like effect, and that the boundaries have been the same for more than fifty years. Upon this evidence I am satisfied that the finding in the certificate is correct, and that the summons by which that finding is disputed must be dismissed.

Another contention is raised by a summons on the part of the representatives of William Woodman, who insist that the certificate is erroneous, inasmuch as it ascribes to the residuary devisee certain woodlands, comprising 51A. 0R. 36P., in the parish of Westhoathly, which the representatives of Woodman claim to belong to and form part of

Tickeridge, and to be included in the devise to Woodman, and which they say ought to be included in the 3d part of the 2d schedule.

A like contention is raised by the same summons by William Osborne, of Maresfield, the devisee of the property mentioned in the 4th part of the schedule to the certificate by the description of "Hill End Farm, in the parish of Maresfield," who insists that a wood, consisting of thirty acres, which by the 8th part of the same 2d schedule is stated to form part of the residuary devise, forms part of the Hill End Farm, and ought therefore to be added to the parcels contained in the 4th part of the same schedule as having passed to William Osborne.

80] *The residuary legatee disputes both of these claims; first, on the ground before mentioned, that nothing out of the parish of East Grinstead passed by devise to Woodman, of which I have disposed; and further, because the woodlands so claimed by Woodman and Osborne, and mentioned in the 6th and 8th parts of the schedule, were not in the occupation of either Woodman or Osborne, as tenants or otherwise, but were retained in hand by the testatrix, or by the trustees of her settlement.

I am of opinion that there is no ground for this contention on the part of Woodman and Osborne. It is clear upon the evidence, and by the admissions of the specific devisees themselves, that from the lands in their respective occupations the woodlands in question had been actually severed, and taken in hand by the testatrix, who was the owner of them. They are not included in the words by which the several devises are expressed, nor can they by any reasonable construction be held to be within the meaning of the gifts.

In the course of the discussion it was more than once suggested, in favor of the specific devisees, that it was the obvious intention of the testatrix to give to the several devisees, her tenants, the lands of which they had been long in the occupation. Of course no such suggestion is entitled to any weight in considering the true construction of the will; but if it were well founded, it clearly could not help the contention of the devisees as to these woodlands, which had for several years ceased to be included in their respective tenancies.

That disposes of the four summonses which were argued before me.

Solicitors for defendants, the applicants on the first summons: *Senior, Attree & Johnson*, agents for *Husey-Hunt, Currey & Nicholson, Lewes*.

Solicitors for applicants on the second summons: *Smith, Senning & Croft*, agents for *Pearless & Sons, East Grinstead*.

Solicitor for applicants on the third summons: *William Clarke*.

Solicitors for applicants on the fourth summons: *Terrell, Honey & Terrell*.

Solicitors for plaintiffs: *Palmer, Bull & Fry*.

[Law Reports, 1 Chancery Division, 101.]

C.J.B., Nov. 8, 1875.

**Ex parte GIBBES. In re WHITWORTH.* [101]

Vendor and Purchaser—Unpaid Vendor—Stoppage in transitu—End of transitu—Destination prescribed by Vendor—Constructive Possession of Purchaser—Goods on Siding at Railway Station appropriated to Purchaser—Part delivery of Goods.

Cotton was shipped at Charleston, in America, for carriage to Liverpool. The purchaser resided at Luddenden Foot, in Yorkshire. The cotton was consigned to the vendor's agent at Liverpool, to whom the bills of lading were also sent by the vendor, together with a bill of exchange for the price of the cotton, drawn by the vendor on the purchaser.

On the arrival of the cotton at Liverpool, the bill of exchange was sent by the vendor's agent to the purchaser, and upon its return accepted by him the bill of lading was sent to him. He then indorsed the bill of lading and sent it to the manager of a railway company in Liverpool, who paid the sea freight and obtained possession of the cotton, which was then forwarded by the railway to Luddenden Foot Station. The invoice of the cotton which was sent to the purchaser described it as shipped by the vendor to Liverpool, consigned to order, for account and risk of the purchaser, Luddenden Foot. The bill of lading provided for the shipment of the cotton into the port of Liverpool, there to be delivered to order or assigns, he or they paying freight immediately on landing the goods:

Held, that the *transitu* prescribed by the vendor ended at Liverpool, and that after the cotton had been delivered there to the railway company as agents for the purchaser, the vendor had on right to stop it *in transitu*.

THIS was an appeal from a decision of the judge of the Halifax County Court.

William Whitworth was a cotton-spinner carrying on business as R. Whitworth & Co. at Boy Mill, Luddenden Foot, near Halifax. He filed a liquidation petition on the 17th of April, 1874, under which a trustee was appointed on the 8th of May. At the time when the petition was filed there were at the Luddenden Foot Station of the Lancashire and Yorkshire Railway Company seventy-eight bales of cotton consigned to Whitworth, which had not been paid for, and as to which the question arose whether the vendors had any right to stop them *in transitu*.

R. Whitworth & Co. were in the habit of purchasing cotton from Gibbes & Co., of Charleston, in America. The course of trading was this: Gibbes & Co. consigned the

cotton, which was purchased from them by Whitworth & 102] Co., to their agents, Brown, Shipley & *Co., of Liverpool, to whom they also forwarded the bill of lading of the cotton, together with a bill of exchange for the price drawn upon Whitworth & Co. On receipt of the draft, Brown & Co. sent it to Whitworth & Co. for acceptance, and, upon its being returned accepted by them, Brown & Co. transmitted the bill of lading to Whitworth & Co., and they, having indorsed the bill of lading, sent it to Mr. Windle, the manager of the Lancashire and Yorkshire Railway Company, at the North Docks Station, Liverpool, where the cotton lay. The railway company then paid the sea freight of the cotton, either by means of remittances sent to them for the purpose by Whitworth & Co., or by advances which they made for the purpose on account of Whitworth & Co., and obtained possession of the cotton, which they then forwarded by their own line of railway to Luddenden Foot Station. The company did not deliver goods from that station, but their ordinary practice was, on the arrival of goods, to send an advice note to the consignee, requiring him to remove the goods within forty-eight hours; and in case he did not do so, he was charged demurrage for the goods at the rate of 3s. per truck *per diem*. This, however, was not the practice in the case of Whitworth & Co. Their mill immediately adjoined the Luddenden Foot Station, and there was a siding there, known as the "Whitworth's siding," for their exclusive use. When trucks consigned to them arrived, no advice notes were sent to them, as from the position of their mill they would be aware of the arrival. They had a ledger account with the company for freight.

The Whitworth's siding was on the south side of the main line of the railway, Boy Mill being on the north side of it. The siding was connected with the main line by points, and with the interior of the mill by means of a turn-table and a level crossing. The siding was constructed on land belonging to the railway company, but it was constructed by the company, and kept in repair by them at the expense of Whitworth & Co. It was closed by means of blocks, which were fastened by padlocks, except at the time when trucks were being moved into or removed from the siding, and trucks could not be removed from it into the mill except with the permission and under the control of the company's officers. But Whitworth & Co., subject to that permission, 103] *and control, could always, after the arrival of goods consigned to them, remove them as and when they pleased into their mill. A notice-board was erected by the com-

pany on the siding, bearing in large letters the words "Whitworth's Siding." Trucks consigned to Whitworth & Co. were generally, on their arrival, placed by the company's servants on the Whitworth's siding, but sometimes they were left standing in the station-yard or in the general siding.

The seventy-eight bales now in question were part of 144 bales purchased by Whitworth & Co. from Gibbes & Co. These 144 bales were shipped from Charleston to New York in two lots of seventy-two bales each, and thence reshipped to Liverpool. Seventy-two bales arrived at Liverpool in a ship called the Republic, and the other seventy-two arrived there in a ship called the Celtic. The invoice of the seventy-two bales ex Republic was headed thus: "Invoice of seventy-two bales uplands cotton shipped by Gibbes & Co. in good order, per S. S. Georgia, Tabor, master, bound for New York, from thence to be reshipped by steamer to Liverpool, consigned to order, for account and risk of R. Whitworth & Co., Luddenden Foot." Then followed a description of the bales, and an account of the charges, which amounted to £1,047 19s. The invoice was received by Whitworth & Co. on the 6th of April, 1874, and on the same day they accepted a bill of exchange for £1,047 19s. which had been drawn on them by Gibbes & Co. and had been sent with the bill of lading to Brown & Co. On the return of the bill of exchange accepted to Brown & Co., they forwarded the bill of lading of the seventy-two bales to Whitworth & Co. The bill of lading was headed thus:

"Charleston to Liverpool.

| | |
|---|--|
| "New York and South Carolina | } White Star Line. New York to Liverpool. J. H. Sparks, Agent. |
| Steamship Company. | |
| Charleston to New York. | |
| Wagner, Huger & Co., Wm. A. Courtenay, | |
| } Agents. | |

"Messrs. Wagner, Huger & Co. and Mr. William A. Courtenay are authorized to issue through bills of lading from Charleston to Liverpool for merchandise shipped by the steamers of the New York and South Carolina Steamship Company to New York to the *consignment of [104 the White Star Line, Limited, for reshipment to Liverpool by steamer or steamers of their own, or other first-class line."

Then followed a description of the seventy-two bales by marks and weight, and the bill of lading went on to provide that the goods were to be carried into the port of New

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York, to be there delivered to the White Star Line, Limited, for transportation by the said company by their own or other first-class steamers from New York into the port of Liverpool, and there to be delivered unto order or its assigns, he or they paying freight immediately on landing the goods. The bill bore date at Charleston the 19th of March, 1874. It was received by Whitworth & Co. on the 8th of April, 1874, and the same day they indorsed it and forwarded it to Windle at Liverpool. He advanced the money to pay the sea freight, and the bales were then given up to him, and were forwarded by the railway to Whitworth & Co. at Luddenden Foot, where they all arrived on or before the 15th of April. Thirty-three of them were at once taken by Whitworth & Co. into their mill for use. Of the remaining thirty-nine, twenty bales in truck No. 3,166 arrived at Luddenden Foot Station on the 14th of April, and nineteen bales in truck No. 1,260 arrived there on the 15th of April. The truck No. 3,166 containing the twenty bales was on its arrival placed by the servants of the company in the Whitworth's siding, where it remained until the 18th of April, when, without any communication with Whitworth & Co., it was removed by the company's servants and placed in the company's general siding. This was done in order to assert a lien which the company claimed for unpaid freight due to them by Whitworth & Co., the company having received information of the filing of the liquidation petition on the 17th of April. The truck No. 1,260 with the nineteen bales remained after its arrival in the company's station yard. In neither case was any advice note given by the company to Whitworth & Co.

In the case of the seventy-two bales which arrived at Liverpool in the ship Celtic, the invoice and the bill of lading were respectively in similar terms to those which were given in the case of the shipment by the Republic. The invoice for the seventy-two bales ex Celtic was received by Whitworth & Co. on the 13th of April, and the same day they accepted a bill of exchange for £1,079 16s. 9d drawn on them by Gibbes & Co. The bill of lading was then sent to them, indorsed by them, and transmitted to Windle, who advanced money to pay the sea freight. The seventy-two bales were then given up to the railway company, and forwarded by them to Whitworth & Co. at Luddenden Foot Station. All these seventy-two bales arrived there on or before the 21st of April, and thirty-three of them were at once taken into the mill for use. Of the remaining thirty-nine bales, twenty-six bales, in truck No. 11,693, arrived at

Luddenden Foot Station on the 19th of April, and thirteen, in truck No. 7,524 arrived on the 21st of April, where they remained in the station yard or in the general siding of the company. They were not placed in the Whitworth's siding.

The company claimed a lien for freight on all four trucks, and on the 22d of April they delivered to the receiver under the petition an advice note for the whole seventy-eight bales. The freight due was afterwards paid by the trustee to the company.

On the 22d of April the agent of Gibbes & Co. at Liverpool gave notice to the station-master at Luddenden Foot, stating that Gibbes & Co. were the owners of the seventy-eight bales, and cautioning him from delivering them to Whitworth & Co., they not being their property. At this time the two bills of exchange had not matured.

The cotton was afterwards sold by arrangement between the trustee and Gibbes & Co., and application was made to the County Court to decide who was entitled to the money arising from the sale. The judge held that as to the thirty-nine bales ex Republic, the transit was at an end before the notice was given by Gibbes & Co. to the railway company, and that consequently the trustee was entitled to these thirty-nine bales. But as to the thirty-nine bales ex Celtic, his honor held that Gibbes & Co. were entitled to them. The ground of the distinction was this, that in his honor's view the act of the railway company in removing the truck No. 3,166 on the 18th of April from the Whitworth's siding to the general siding amounted to a determination of the previously subsisting arrangement between the company and Whitworth & Co., by virtue of which the latter were at liberty to take possession of goods consigned to *them [106 immediately on their arrival, without any permission of the company, and without paying the company's charges for freight. Consequently the thirty-nine bales ex Celtic, which arrived at Luddenden Foot Station after the 18th of April, were not constructively in the possession of Whitworth & Co., but remained in the company's possession as carriers until their charges were paid, which was not done till after the notice had been given by Gibbes & Co. not to deliver the goods to Whitworth & Co.

The trustee appealed from the decision, and Gibbes & Co. presented a cross appeal.

Benjamin, Q.C., and Jordan, for the trustee: We contend that as between Gibbes & Co. and Whitworth the *transitus* of the goods was at an end before any attempt was made to stop them *in transitu*. The *transitus* was at

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an end at Liverpool. The test is this: Have the goods reached the place where they were to be conveyed by the carriers, and where they will remain unless the purchaser gives some fresh order for their subsequent disposition? *Wentworth v. Outhwaite* ⁽¹⁾. In this case, when the cotton had arrived at Liverpool, and Whitworth had accepted the bills of exchange, and the bills of lading had been sent to him, it was subject to his order. The property had then passed to Whitworth, and the cotton was in his possession by means of the railway company, who were his agents, before the petition was filed. In *Coventry v. Gladstone* ⁽²⁾, Lord Hatherley (when Vice-Chancellor) said: "The question is, not whether the voyage is at end, but whether the goods are at home, actually or constructively in the possession of the vendee."

At any rate, looking at the course of dealing between Whitworth and the railway company, the cotton was all constructively (if not actually) in his possession before the petition was filed, and nothing which the company did after the petition was filed could alter his rights. Their lien for freight does not affect the question: *Allan v. Gripper* ⁽³⁾. Moreover, as part of the entire cargo of each ship was delivered to Whitworth, and actually consumed by him, that [107] amounted to a constructive delivery of the *whole cargo: *Crawshay v. Eades* ⁽⁴⁾. The only exception to the rule that delivery of part is a constructive delivery of the whole, is where it appears that the partial delivery was not intended to operate as a delivery of the whole: *Bolton v. Lancashire and Yorkshire Railway Company* ⁽⁵⁾.

De Gex, Q.C., and *Finlay Knight*, for Gibbes & Co.: We say that when we gave the notice we had a right to stop the whole seventy-eight bales. But, at any rate, the order of the County Court Judge is right as far as it goes. Brown & Co. were in truth the consignees at Liverpool, they were our agents, and the *transitus* as between vendor and purchaser did not begin until the goods left their control. The goods were not in the possession of any one on behalf of the purchaser until they were delivered to the railway company at Liverpool. The company only took possession of them in the character of common carriers, and the fact that the carrier is selected by the purchaser makes no difference in the vendor's right to stop *in transitu*. The vendors never parted with the control of the goods until they were placed

⁽¹⁾ 10 M. & W., 436, 450.

⁽²⁾ Law Rep., 6 Eq., 44.

⁽³⁾ 2 Cr. & J., 218.

⁽⁴⁾ 1 B. & C., 181, 185.

⁽⁵⁾ Law Rep., 1 C. P., 431.

⁽⁶⁾ 9 M. & W., 518.

in the hands of a public carrier for transmission to the purchaser, and they, therefore, had a right to stop them *in transitu* at any time before there was an actual or a constructive delivery to the purchaser at Luddenden Foot:

Whitehead v. Anderson (*). The *transitus* was not over until the goods were actually taken into Whitworth's mill. The Whitworth's siding was only set apart for Whitworth's use for the mutual convenience of him and the company; it was not his property. In order to change the character of the railway company from that of carriers into that of warehousemen, it must be shown that there was some positive contract to that effect between them and Whitworth:

Whitehead v. Anderson. Nothing of the kind is shown, and, in fact, the goods had not left the company's own trucks. The lien of the company for freight is a material point in the case, inasmuch as their acts show that they considered they had a right to place the goods anywhere they pleased on their own line. The doctrine of part *delivery does not apply, for the contents of each truck [108 must be treated as a separate parcel.

[They referred also to *Berndtson v. Strang* (*); *Tucker v. Humphrey* (*).]

BACON, C.J.: In my opinion the case is reasonably clear.

The question is one of most ordinary occurrence. The merchants, the owners of cotton at Charleston, agree to send shipments to Liverpool, and no where else. They send them from Charleston by two vessels for transhipment at New York, and they are to be paid for by acceptances of Whitworth. The vendors send the bills of exchange to Brown, Shipley & Co., in order that they may present those bills for acceptance to Whitworth. They accompany the bills with the shipping documents, and upon the acceptance of the bills the shipping documents are given up to the purchaser's agent. The title to the delivery and possession of the goods is transferred by means of the bill of lading. The destination of the goods was Liverpool. If anything had happened to the purchaser during the voyage there, the vendors would have had a right to stop the goods. At the place which the vendors prescribe as the destination of the goods the goods arrive; the *transitus* is then ended. The vendee, the person on whose risk and account the goods were to be so shipped, had no right to claim the goods unless he was, as he became by the act of the authorized agent of the vendors, the absolute owner of the goods. The goods were paid for by means of bills, which I am quite aware are

(*) 9 M. & W., 518.

(*) Law Rep., 4 Eq., 481.

(*) 4 Bing., 516.

not good bills by reason of the subsequent failure of the purchaser, but they were paid for in the manner stipulated, and when the goods arrived at Liverpool the purchaser acquired a right, by the fact of his having accepted the bills and performed the condition, to demand from the ship's master the delivery to him of the goods. He exercised that right, and the argument has been that there remained a *transitus* after that. How is it possible to say there could be any *transitus* after that? If the point of destination [109] had not been reached, then what Mr. *De Gex has said to me might have applied. But that is not the present case at all. When Windle, the agent for Whitworth, paid the sea charges, which he did on Whitworth's account, he became the holder of the bills of lading for Whitworth, and the goods were delivered to him in that character, and there was an end of the *transitus* prescribed by the vendor. The *transitus* which took place after that was only prescribed by the purchaser; the vendor had nothing to do with it. The vendor's *transitus* was at an end, and it is in vain to read such cases as have been cited, all of which are familiar instances of stoppage *in transitu*. What can they have to do with a case of bargain and sale of goods to be delivered on the wharf at Liverpool on certain conditions being complied with, which conditions are complied with? The delivery takes place, the *transitus* is at an end, and after that the right at law to stop these goods never existed.

Even if it were otherwise, there would apparently be a great deal to be said on behalf of the trustee. But I need not go into it. Upon the statements which have been made respecting Whitworth's siding, and the use which was from time to time made of it by Whitworth, I think the goods had come home when they were placed upon the siding. I think, moreover, that there was a constructive delivery to the purchaser of the whole of the goods by a delivery of part, if it were necessary, as in my judgment it is not, to resort to that doctrine. I think the taking out by the purchaser, at his own mill of the cotton from several of the trucks, containing different parcels not distinguishable, and working it up in his own manufactory, as clear a constructive possession of the entirety as the law would require.

The only other thing to be noticed is, the act of the railway company, who, having gone on in an amicable manner, not demanding payment of their freight on the instant, but keeping an account of the transactions between themselves and Whitworth, bethink themselves all of a sudden that they will keep such of the goods as had not been

carried across the railway (I do not use the word "delivered," but "carried across the railway"), until they are paid their charges. What has that to do with the question I have to consider? They may be right or wrong. Upon that I will not express any opinion. But of this I am clear, that their *act cannot have altered any right which [110] existed before. Their lien was upon what? Upon Whitworth's goods. It is because they were Whitworth's goods they claimed the lien. It is not necessary to dwell upon that part of the case at all, but in my opinion the order which has given to the trustee only part of the goods in question cannot be sustained. Neither can the order which gives to the vendor the other part of the goods be sustained. The proper order will be to declare that the trustee is entitled to the whole of the goods which were in the possession of the railway company as the agents, carriers, or anything you like to call them, of Whitworth at the time of the failure.

The cases which have been referred to do not affect the principle on which I have decided this case. *Wentworth v. Outhwaite* (¹) is very plain and pointed, that although there were certain goods which were to be delivered to a man at a place thirty miles from Leeds, yet, as they were actually delivered at Leeds to a workman of his, the delivery to the purchaser was complete. Lord Abinger says (²): "It seems to me that a great part of the very learned argument which we have heard turns upon a question of fact, whether Leeds was the place of destination to which the goods were to be sent. It may be the place of destination at which the goods are to be at the consignee's risk, and I think that in this case it was the place where they were to be at his risk until he sent for them." In the very terms of the invoice that applies to the present case. Mr. Baron Parke's judgment is to the same effect (³). "I think the goods had arrived at their place of destination, for that, as I understand, means the place to which they were to be conveyed by the carriers, and where they would remain unless fresh orders should be given for their subsequent disposition." Then he quotes Lord Ellenborough's decision in *Dixon v. Baldwin* (⁴), observing: "After referring to the several cases on this subject, Lord Ellenborough says, 'In those cases the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination,

(¹) 10 M. & W., 436.

(²) 10 M. & W., 449.

(³) 10 M. & W., 450.

(⁴) 5 East, 175.

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111] and without such orders they would continue *stationary.'" Then *Whitehead v. Anderson* (') does not, in my opinion, assist Mr. De Gex's argument. It is there stated by Mr. Baron Parke ('): "The law is clearly settled, that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at end."

But without going further into the authorities, which, although numerous, are not by any means obscure or doubtful, it appears to me that the right of stoppage *in transitu* ended when the goods were delivered by virtue of the bills of lading to the purchaser's agent, and that after that there could be no such right, for there was no *transitus* to which it could apply. I shall make no order as to costs.

Solicitors for vendors: *Speechly & Co.*, agents for *G. E. Mumford, Bradford, Yorkshire*.

Solicitors for trustee: *Johnson & Weatheralls*, agents for *George & Wade, Bradford, Yorkshire*.

(') 9 M. & W., 518.

(') 9 M. & W., 534.

[Law Reports, 1 Chancery Division, 115.]

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115] **In re* WESTERN OF CANADA OIL, LANDS AND WORKS COMPANY.

CARLING, HESPELER AND WALSH'S CASES.

Directors—Qualification found by Promoter—Fully paid-up Shares.

W. entered into an agreement with a person as trustee of an intended company for the sale to the company of a property for a certain sum in cash and a certain number of fully paid-up shares. The agreement was not to be binding unless adopted by the company when formed. The company was formed, and the agreement was set out in the articles. W. applied to the appellants to become directors, which they agreed to do upon his promising to transfer to them fully paid-up shares to qualify them. They acted as directors, and adopted the agreement for sale. The number of shares requisite for the qualification of a director was five, but after the completion of the purchase thirty paid-up shares were, by the direction of W., allotted to each of the appellants, and they were entered on the register as holders each of thirty fully paid-up shares, and received certificates to that effect. An order was afterwards made for winding up the company, and the Master of the Rolls settled them on the list of contributories for thirty unpaid shares each:

Held, on appeal, that the appellants, as to the shares allotted to them, stood in the same position as if those shares had been allotted to W. and transferred to them by

him; and that, as there was no contract between them and the company that they would take shares independently of their accepting certificates stating them to be the holders of these fully paid-up shares, they could not be placed on the list of contributories as holders of unpaid shares; and the order of the Master of the Rolls was discharged without prejudice to any application that might be made against them under the Companies Act, 1862, sect. 165, or otherwise, on the ground that they had entered into a corrupt bargain with W.

THIS was a motion by Carling, Hespeler and Walsh, the three Canadian directors of the Western of Canada Oil, Lands and Works Company, by way of appeal from an order of the Master of the Rolls putting them on the list of contributories for thirty shares each not paid up⁽¹⁾.

The company was registered on the 21st of December, 1871, with a nominal capital of £450,000 in £100 shares. Its principal objects, as stated in the memorandum of association, were to acquire certain lands, oil wells, &c., in Canada, and to carry on *the business of oil distillers, manu- [116
facturers of chemical compounds, &c.

The third clause of the articles of association set forth an agreement dated the 18th of December, 1871, expressed to be made between John Walker, on behalf of himself and other vendors of the one part, and William Hartley, "as a trustee on behalf of an intended joint stock company to be registered in England under the title of The Western of Canada Oil, Lands and Works Company," of the other part. By this agreement it was provided that the vendor should sell, and the company when incorporated should purchase, the lands, oil wells, &c., therein mentioned, at the price of £400,000. The purchase was to be completed by the 31st of March, 1872. Of the purchase-money £150,000 was to be paid in money, and the remainder in 2,500 fully paid-up ordinary shares of £100 each in the company. The agreement went on to provide that "This agreement shall not be binding until adopted by the company, nor thereafter unless and until a competent person, to be appointed by the directors of the said company, shall have certified to them that the intended debenture issue of the said company of £225,000, or such smaller amount as may be raised, is fully covered by the aggregate values of the various properties to be purchased by the said company; nor unless and until a good title shall be shown to the said several lands and hereditaments respectively; nor unless the acreage of land shall be satisfactorily verified."

Clause 79 provided that the first directors should be appointed by the subscribers thereto, and should continue in office until the ordinary meeting of the company in 1874.

(1) Law Rep., 20 Eq., 580.

Clause 80, that at any time before the first ordinary meeting the board might from time to time add to their number by the appointment of duly qualified members as directors, provided that the number of directors should never exceed nine. Clause 81, that the qualification of a director should be the holding of not less than five shares of the company in his own right. Clause 107, among other extensive powers given to the directors, authorized them to borrow in the name or otherwise on behalf of the company such sums of money on such terms as to interest and otherwise as they from time to time thought expedient, either by way of mort-
[17] gage of the *whole or any part of the property of the company, or by bonds or debentures, or in such other manner as they deemed best.

The memorandum and articles were subscribed by seven persons, who took one share each, Walker, the vendor, being one of the subscribers. The agreement of the 18th of December, 1871, was registered.

The present appellants were the three Canadian directors of the company—Carling, Hespeler and Walsh. The account which Carling gave of the way in which he became a director was as follows:

“Towards the middle of January, 1872, the said John Walker came out to Canada, and I had interviews with him on the subject of the above-named company. He brought out with him from England a copy of the prospectus which had been prepared in England, and issued, as I was informed and believe, by the directors in England, whose names appeared on the prospectus, namely [here followed three names]. The said John Walker brought out with him to Canada at the time aforesaid a copy of an agreement expressed to be made between the said John Walker, on behalf of himself and other vendors of the one part, and W. Hartley, as trustee on behalf of the above-named company, of the other part, whereby it was stipulated the said John Walker agreed to sell certain oil wells and property to the above-named company, by virtue of such contract, for a sum in cash and for 2,500 fully paid-up ordinary shares of £100 each in the said company; and the said John Walker informed me that in the prospectus, under the notice respecting the debentures, my name had been inserted as one of the Canadian directors, and he asked me to act as a director of the company in Canada, stating that he would transfer to me certain fully paid-up shares in the above-named company if I would consent to act as such director, such shares being for the purpose of qualifying me as a

director of the said company. I stated to the said John Walker that I would be willing to act as a director in Canada of the above-named company upon his informing me that a sufficient number of fully paid-up shares in the above-named company to qualify me as a director would be transferred to me."

The statements made by Hespeler and Walsh as to what passed between them and Walker were precisely in the same terms.

*At a meeting in Canada of the three Canadian directors on the 23d of January, 1872, the agreement of the 18th of December, 1871, was adopted. At a subsequent meeting on the 7th of February it was resolved that a certain part of the property agreed to be purchased should be omitted from the contract, and that the issue of debentures should be accordingly reduced by £25,000. It was stated by the appellants in their affidavits that it was at the same time agreed between Walker and the directors that the vendors should make an abatement in the price to the extent of 500 of the fully paid-up shares which the vendors were to receive. The abatement appeared, however, to have been treated as being of 250 shares.

The prospectus above referred to, after being modified in conformity with the last-mentioned resolutions, was as follows:

"Issue of £225,000 £12 per cent. mortgage debentures, in 2,250 bonds of £100 each, secured by first charge on the company's property.

"Redeemable by annual drawings at £130 per debenture, or convertible at the option of the holders into ordinary shares at par.

"Interest payable half-yearly in London.

"The Western of Canada Oil, Lands and Works Company, Limited.

"Capital £450,000,

of which £225,000 is reserved to meet the conversion of debentures into shares at the option of the holders.

"The share capital of £450,000, in 4,500 shares of £100 each, receives no dividend until all the debentures have been redeemed or converted. 2,250 shares are disposed of in terms of the prospectus, and 2,250 shares are reserved for future issue or for purposes of conversion of the debentures.

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"The 2,250 mortgage debentures of £100 each are now offered for subscription."

There followed a statement of the times at which the money advanced on the debentures was to be paid in, and three persons were named as trustees for the debenture-holders. There then followed the names of three persons [19] as the directors in England, *and of the three appellants as the directors in Canada. A considerable sum was received from the issue of debentures.

Sometime after the meeting of the 7th of February, 1872, the directors paid Walker the £150,000 out of the moneys arising from the debentures, and the purchased property was conveyed to the company. The dates did not appear, but a resolution mentioning that the land had been conveyed, and directing the solicitors to pay Walker the balance due to him, was passed by the Canadian directors on the 5th of July, 1872.

No shares in the company were ever allotted, except shares allotted to Walker or his nominees as fully paid-up shares. The affidavit of the appellant Carling contained the following statement as to the allotment of shares to him, and the statements of the other appellants were to a similar effect:

"It was well known to the directors of the company in England, as I am informed and believe, that there were no other shares in the company than those shares which it had been agreed should be issued to the vendors as fully paid up, and that the directors of the company both in England Canada were, by virtue of arrangements made with the said John Walker, to be qualified by having transferred to them a sufficient number of fully paid-up shares to qualify them to act as directors."

The affidavit then proceeded to state that on the 4th of June, 1872, one of the English directors wrote to Walker asking for instructions as to the persons to whom the shares given for the property were to be issued, and that on the 6th of July, 1872, Walker telegraphed the answer: "Issue 1,500 shares to A. McEwen, 30 shares John Carling, 30 A. Walsh, 30 Jacob Hespeler, 40 W. F. Howell, balance myself," and that the directors in England proceeded thereupon to issue and register in Carling's name thirty shares in the company. They also issued to him three certificates for ten shares each, which stated on their face that £100 per share had been paid. The deponent went on to say:

"I never agreed to take any shares from the said company. I never saw the prospectus of the said company,

nor did I know the nature of such prospectus until after the said company had been registered. I never subscribed the memorandum or articles of *association. I never ap- [120 plied for any shares in the company, and (save as herein stated) I never covenanted or entered into any contract to act as a director of the company; nor would I have acted or assumed to act as a director of the said company unless I believed that a sufficient number of the fully paid-up shares agreed to be issued to the vendors, and which was the sole share capital of the company capable of being issued at the time at which I agreed to join the said company, to qualify me as a director, would have been transferred to me. The shares allotted to me over and above the number necessary to qualify me as a director were allotted to me without any previous request on my part, and I was not aware that they had been or would be allotted to me, until I received the scrip certificates for them."

On the 8th of November, 1873, an order was made for the compulsory winding-up of the company, and the official liquidator applied to settle the name of each of the appellants on the list for five unpaid shares as a director, and for twenty-five fully paid-up shares. The Master of the Rolls directed the summons to be amended, so as to seek to place each on the list for thirty unpaid shares; and on the 10th of July, 1875, he decided that each must be on the list for thirty unpaid shares⁽¹⁾.

Chitty, Q.C., and *Dumergue*, for the appellants: We admit that if there was any agreement or understanding between Walker and the appellants before all matters between Walker and the company had been closed that the appellants should receive the paid-up shares, the appellants cannot as against the company retain those shares. But it does not follow from this that they can be put on the list for those shares as unpaid shares. There was not, as there was in *Hays's Case* (*), any contract with the company to take shares. Acting as a director, does not bind a person to take unpaid shares from the company; his obligation is satisfied by his having paid-up shares transferred to him: *Brown's Case* (*). The shares issued to Walker and his nominees are really paid-up shares: *Hartley's Case* (*); *Spargo's Case* (*). There was no contract whatever on the [121 part of the appellants to take shares, except their acceptance of certificates for fully paid-up shares; and this con-

(1) Law Rep., 20 Eq., 580.

(2) Ibid., 10 Ch., 593.

(3) Law Rep., 9 Ch., 102.

(4) Law Rep., 10 Ch., 157.

(5) Law Rep., 8 Ch., 107.

tract cannot be split up—it must be maintained as a whole, or set aside as a whole. The appellants may be fixed as trustees for the company of paid-up shares, but they cannot be turned into holders of unpaid shares.

Roxburgh, Q.C., and *Whitehorne*, for the official liquidator: A person wishes to form a company and get a large bonus. He enters into a contract with a person expressed to be a trustee for the company, for the sale of property to the company at an enormous price, which contract is not to be binding till adopted by the company; he then gets a set of directors, whom he bribes by giving them part of the price.

[JAMES, L.J.: There is no doubt that such a transaction cannot stand, but the question before us is whether this order gives you the proper remedy.]

MELLISH, L.J.: May not the proper remedy be to fix the appellants with the highest selling value of their shares?]

We submit not; but with the full nominal value, for these shares represent aliquot parts of the price.

[JAMES, L.J.: Surely they represent aliquot shares of what is purchased?]

The appellants must be charged with the full value of the shares: *General Exchange Bank v. Horner* ⁽¹⁾; and there is no test of value but the nominal value. Then the appellants are on the register, and are shareholders. The *prima facie* liability of a shareholder is to pay up the nominal value of his shares, and it lies on him to show that he has done so. The appellants cannot show this.

[MELLISH, L.J., referred to *Currie's Case* ⁽²⁾.]

[*Jones's Case* ⁽³⁾ was also referred to.]

Currie's Case is distinguishable; for we are not here seeking to alter the contract.

[22] * [JAMES, L.J.: There was no contract between the appellants and the company beside the acceptance of a certain document giving them fully paid-up shares. Are you not altering that by fixing them with unpaid shares?]

Where a director obtains the shares in breach of his duty to the company, he cannot hold them as fully paid up: *Ex parte Daniell* ⁽⁴⁾.

[MELLISH, L.J.: That is an affirmance by one Lord Justice, the other doubting or dissenting. Has it been followed?]

JAMES, L.J.: There was no contract there with a third party, under which paid-up shares could be created.]

⁽¹⁾ Law Rep., 9 Eq., 480.

⁽²⁾ Law Rep., 6 Ch., 48.

⁽³⁾ 3 D. J. & S., 367.

⁽⁴⁾ 1 De G. & J., 372.

Nickoll's Case (¹) is to the same effect.

[MELLISH, L.J.: That seems like the case where a subscriber to the memorandum of association gets paid-up shares transferred to him.]

Dent's Case (²).

[MELLISH, L.J.: That stands on the same ground.]

Cleland's Case (³) favors our contention.

Chitty, in reply: The conduct of the directors hardly calls for the severe remarks of the Master of the Rolls. Nobody has been deceived; the debenture holders have got all the security they contracted for, and the seven subscribers to the memorandum knew all about the transaction.

[JAMES, L.J.: It was represented to the debenture holders that the contract for purchase was subject to the approval of the directors, whom they had a right to suppose to be an independent body.]

Then there is no corrupt bargain as to any but the five shares. Walker only undertook to provide the necessary amount for a qualification, and after the purchase had been completed it was *perfectly competent to the directors [123 to accept a present of the other twenty-five shares from him.

[BRETT, J., referred to the wording of the affidavits of the directors, where it was said that Walker stated "that he would transfer to me certain paid-up shares," not saying "five."]

As to *Ex parte Daniell* (⁴) there were no paid-up shares in the company, and the transaction merely came to this, that the directors declared that their own shares should be treated as fully paid up. Here there were paid-up shares, and *Brown's Case* (⁵) shows that it makes no difference that they were allotted direct to the appellants instead of being allotted to Walker and transferred by him to the appellants, in which case there could have been no question.

JAMES, L.J.: In a case in which, two or three days ago, we sustained a decision of the Vice-Warden of the Stannaries Court, making a gentleman, who had received shares under circumstances very analogous to those of the present case, pay the full nominal amount of those shares, we, in giving our judgment, expressly reserved the consideration of the main point which we have now to determine, that is, whether, under such circumstances, the shares can be treated as unpaid shares. We have now to determine that point, the question not being before us to what relief in any other

(¹) 24 Beav., 639.

(²) Law Rep., 8 Ch., 768.

(³) Ibid., 14 Eq., 387.

(⁴) 1 De G. & J., 372.

(⁵) Law Rep., 9 Ch., 102.

form of proceeding the company may be entitled as against the appellant. We entirely agree with the Master of the Rolls that these gentlemen committed a very grave and very reprehensible breach of trust in accepting a qualification from a person who was a vendor to the company, and with whom it would be their duty to deal as trustees for the company. But then the question arises, what is the mode in which relief is to be given in respect of such a breach of trust? Of course we are not capriciously to punish the persons who have committed it. We have to see that, if they are punished, they are punished in due course of law. 104] *The mode in which the Master of the Rolls has fixed these gentlemen is by treating as unpaid shares the shares for which they are entered in the register as holders of paid-up shares. Now beyond all question they never made themselves liable to take any shares at all—they never contracted to take shares or to pay for shares—the only contract between them and the company was the contract that arises from the fact that certificates of the shares as paid-up shares were sent to them and they accepted those certificates. If, therefore, the case depends on a contract between them and the company, the contract must either be approbated or reprobated. If the contract was a contract that they would take paid-up shares, we cannot convert that into a contract to take unpaid shares. These shares formed part of the shares which had been agreed to be given to Mr. Walker in part payment of his purchase-money, and I think that the case cannot be distinguished in point of legal result from what it would have been if the shares had been formally registered in the name of Walker, and then transferred by Walker to the directors in pursuance of his agreement with them. If that had been done in form, which was the substance of the transaction, it appears to me that it would have been impossible to treat the shares in the hands of Walker's transferees otherwise than as paid-up shares which Walker had got from the company, and which had been transferred from Walker to the directors. In that state of things the transfer would have been a simple bribe or present to the directors, constituting a breach of trust on their part and a misfeasance in respect of which they would have to account in exactly the same way, and on the same principles, as if he had handed them over a piece of property, or a diamond, or a sum of cash; that is to say, the company would be entitled to get back from their unfaithful trustees what the unfaithful trustees had acquired by reason of their breach of trust and misfeasance.

That leaves the appellants liable to be called upon under the 165th section, at the suit of the company, or at the suit of any creditor of the company, to make such compensation as the court shall think ought to be made under the circumstances with respect to the misfeasance. What the extent of that is it is not for us at present even to *shadow forth. It is not for us, I think, to express [125 any opinion as to the mode in which the amount of the compensation is to be ascertained, because probably fresh facts may be produced before the Master of the Rolls, and it may have to be considered by him as an entirely new case upon that application, and it may have to be reconsidered by us, or whoever may constitute the Court of Appeal, when the case comes up for further discussion. I therefore purposely abstain from saying anything about what may be the possible results of any such proceeding against the appellants, but I am of opinion that we cannot in law make these shares unpaid shares.

The only difficulty which occurred to me during the argument was created by *Ex parte Daniell* ⁽¹⁾. That was a case in the Court of Appeal, but it was a decision of one Lord Justice affirming that of the Master of the Rolls, with a strong expression of doubt on the part of the other Lord Justice. But apart from that, there was there nothing like a contract with a third person which was fulfilled by transferring shares to the directors; there was simply a gift by directors to themselves, independently of any contract whatever, and without any bargain to which the transaction could be referred. The directors put themselves on the list as shareholders, and were then challenged to show how they had paid up the shares. The court held, and probably rightly, that it was not competent for them, having put themselves by their own act, without any contract, on the list of shareholders, to say, "We never meant to pay for those shares, and we took them as a present." It was a very strong case, and the court thought that they could not set up their own entry of a payment which never was made, and could not be heard to say, "We meant to steal these shares from the company; we meant to take the company's property and divide it amongst ourselves." *Ex parte Daniell* is therefore distinguishable, in a very material point of fact, from the present; and I do not think we should be justified in treating it as governing this case. My opinion, therefore, is that the order of the Master of Rolls ought to be discharged, without prejudice to any application which the

(1) 1 De G. & J., 372.

company or any person whatever may think it right to make under the 165th section of the act.

[26] *MELLISH, L.J.: I am of the same opinion. I entirely agree that the acceptance of these shares on the part of the directors was a breach of trust, but I do not wish to give any opinion whether that breach of trust was confined to the five shares, or extended to the whole thirty; first, because I do not think that on this affidavit, which is the only evidence before us, any very satisfactory conclusion can be come to as to whether the original bargain related only to the five shares which formed the qualification, or related to the whole thirty; and, secondly, because, without a much more careful examination into the precise state of things as between the company and Walker at the time when the thirty shares were allotted, it is impossible to tell whether there did still remain duties to be performed by the directors for the benefit of the company as between the company and Walker, the existence of which would make the acceptance of shares from him a breach of trust, even although it had not been previously agreed. On the question, therefore, whether the breach of trust extends to the whole thirty shares, or only to the five shares, I wish to give no opinion.

But what is the consequence of the breach of trust, whether it extends to the five or to the whole thirty? There certainly are three things, any one of which the company might do. They might say, in the first instance, "These shares never ought to have been allotted to the directors at all;" and if they were now valuable shares they could say, "Transfer them back to us, for you never were entitled to them." Secondly, if the directors had sold the shares and made a large profit out of them, the company could have said, "Those shares were our shares, you were trustees for us, and therefore you shall hand over to us the entire profit you have made by selling them;" and, thirdly, the company might say, "Although you have made no profit by selling these shares, yet, by having had them allotted to you, you deprived us of the power of allotting them to other persons, therefore you must pay us the sum which we have lost by reason of our being deprived of the right of allotting those shares to other persons who would have paid them up." Of these three remedies the liquidators may, in my judgment, take whichever is most beneficial to the company. [27] But can they do more? Can they say, "Although the shares which you have taken, which were the property of the company, were absolutely worthless or

worth very little, both at the time when you took them and ever since, nevertheless, inasmuch as nominally they were £100 shares, we will make you liable for that full sum of £100 on each share?" In my judgment that would be inflicting an arbitrary punishment on a trustee for his breach of trust. It would not be indemnifying the *cestui que trust* for the injury he had sustained, but would be giving him a sum which, if the breach of trust had never been committed, he would not have acquired. This appears to me to be in principle wrong.

Now, the argument for the liquidator has been based upon *Ex parte Daniell* (¹), and is in substance this: "There are two steps in the breach of trust you have committed: first, the allotting the shares, which makes you a shareholder and member; and, secondly, the entering them as paid-up; and we are entitled to adopt so much of the transaction as relates to allotting the shares and making you a shareholder, while we repudiate that portion of the transaction which represents the shares as being paid up." *Ex parte Daniell* is rested on as an authority for that, but, in my opinion, there is a material distinction between *Ex parte Daniell* and the present case. In *Ex parte Daniell* there was no contract between any third person and the company entitling that third person to paid-up shares. The only contracts that took place were between the directors and the particular director to whom the shares were allotted. It was a case, in fact, in which directors made presents of the shares of the company to each other, and in that state of things it was held (and it is not necessary to say whether it was held correctly or not) that *quoad* the allotment the transaction might be ratified and as to the rest repudiated. Lord Justice Turner said that each of the two steps was a breach of trust, but I confess I should have rather thought it a more correct way of putting the case to say that *quoad* the allotment of the shares to the directors the transaction was perfectly valid, but *quoad* entering the shares as paid-up shares it was a breach of trust; and therefore, that what was a breach of trust could be done away with, while that *which was not a breach of trust remained in force. [128 But in the present case it is perfectly plain that there was a contract with Walker, by which Walker was entitled to a large number of paid-up shares, and that contract was registered so as to take the case out of the provisions of the act of 1867; so that, if the shares had been given to Walker, he and any persons to whom he afterwards transferred them

(¹) 1 De G. & J., 372.

would have held them as fully paid-up shares. Now, I agree with what the Lord Justice James says, which I think is very strongly confirmed by what is said by Lord Selborne in *Brown's Case* ('), that the legal effect of an allotment of these shares to the directors at Walker's request is exactly the same as if the shares had been allotted to Walker himself as paid-up shares and then transferred by Walker to the directors. The shares in question were not allotted in pursuance of any contract made between the directors and the particular director to whom the allotment was made, but Walker, being entitled to have paid-up shares allotted either to himself or to his nominees, desired that they should be allotted to particular directors as his nominees, and they were accordingly so allotted. I feel grave doubt whether there is any contract between the particular person who accepts the shares and the company, beyond this, that of course, by being entered in the register as a paid-up shareholder, he at any rate becomes a paid-up shareholder. It appears to me, therefore, that there is nothing to compel us to do what I cannot help thinking it would be a great injustice to do, namely, to make gentlemen who no doubt have committed a breach of trust liable, not for the consequences of that breach of trust, but liable to pay to the company a sum of money which, if that breach of trust had not been committed, the company could not have recovered. It appears to me that the only contract entered into by these gentlemen with the company being that they became members of the company by accepting certificates of paid-up shares, that contract must either be adopted or rejected in its entirety. If it is rejected, they are not shareholders at all. If it is adopted, the company is entitled to say, "They are not your shares, but ours," but that does not make them hold unpaid-up shares. I agree, therefore, with the Lord Justice.

[29] *BRAMWELL, B.: I am entirely of the same opinion; and therefore I shall say nothing except that I should be very sorry to have it supposed for a moment that we consider these gentlemen not to have done wrong, as Mr. Chitty to some extent contended. I think that they have, and I think it very desirable that people should be taught that such a proceeding is wrong, for I believe that there are many persons who, not meaning to do anything morally wrong, are not conscious that they are committing a great error when they put themselves in the situation of having an interest adverse to those on whose behalf they ought to

(') Law Rep., 9 Ch., 102.

act. I think, however, that the law has quite sufficiently provided a remedy for misconduct like this, without doing what I think we should do if we supported this order, that is to say, distort the facts of the case, and find that to exist which in reality does not exist.

BRETT, J.: I am very sorry to be obliged to agree in this judgment. I should have been exceedingly happy if I could have agreed with the judgment of the Master of the Rolls, for I think that the law ought to be kept as wide as it can be, in order to put an end, if possible, to this system of directors taking paid-up shares; but it seems to me that we cannot in point of law hold that these persons are liable to pay to the company the amount of these shares as if they were unpaid. They can only be made liable to pay anything to the company in respect of these shares under a contract to pay calls in respect of them, or by reason of a breach of trust. Now, as I apprehend, there never was a contract at all between these gentlemen and the company with regard to these shares; they never entered into a contract with the company to take shares at all. If they had entered into a contract with the company to take shares, that would have involved a contract to pay for them. But by merely taking paid-up shares from a third person they certainly never entered into any contract with the company to pay anything in respect of those shares; and therefore they cannot be held liable to pay on the ground that they contracted to pay. The fact of their accepting these shares at the moment they did ^{was} a [130 breach of trust, but the effect of that breach of trust is not to make them liable to pay the nominal amount of the shares, but to make them liable as trustees of the company, for the real value of the shares. This, it seems to me, would have been the case before the act of 1862; but under that act there is a summary remedy given to the company or to the bond-holders by the 165th section; and I think, considering what answers may be made to some people and what answers cannot be made to others, it may be a matter of grave consideration, if it be thought necessary to make an application under the 165th section, in whose name that application shall be made.

Solicitors: *Lewis, Munns & Longden; Harrison, Beal & Harrison.*

See 12 Eng. Rep., 154 note; *ante*, 281 and note.

[Law Reports, 1 Chancery Division, 171.]

C.A., Dec. 8, 1875.

171] *REPUBLIC OF COSTA RICA V. ERLANGER.

[1874 C. 113.]

Cross Bill—Corporation—Discovery—Staying Proceedings.

An original bill was filed by a foreign republic, and a cross bill was filed by one of the defendants against the republic and one of its officers, made a defendant for the purpose of discovery:

Held (reversing the decision of Malins, V.C.), that the court would not order proceedings in the original suit to be stayed until the officer of the republic had appeared.

Semble, that the suit might be stayed until the republic had named a proper person to give discovery.

Semble, that the rule is the same in the case of a corporation.

A BILL had been filed by the Republic of Costa Rica against Emile Erlanger and others. The defendant Erlanger filed a cross bill against the Republic of Costa Rica and the President of the Republic, making the president a defendant for the purpose of discovery. The causes were proceeding under the old practice.

Erlanger then gave notice of motion before the Vice-Chancellor Malins that proceedings in the original suit might be stayed until the defendants in the second suit had appeared and answered. The Republic then appeared. The Vice-Chancellor Malins made an order on the motion that the proceedings in the original suit should be stayed until appearances should be entered by the defendants in the cross suit.

The Republic of Costa Rica appealed.

Glasse, Q.C., and *Locock Webb*, Q.C. (*Higgins*, Q.C., with them), for the appellants, referred to *United States of America v. Wagner* ⁽¹⁾; *Republic of Peru v. Weguelin* ⁽²⁾; *Prioleau v. United States* ⁽³⁾.

Cotton, Q.C., and *Fry*, Q.C. (*Ingle Joyce* with them), for Erlanger: The Republic is a corporation, and we have a [72] right to select *one of its officers, and make him a defendant, for the purpose of discovery. It is then the practice to stay proceedings until the defendants to the cross bill have appeared and answered. The cases cited on the other side rather show that the plaintiff in a suit against a corporation has a right to select a proper officer of a corporation. If the officer selected happens to know nothing about it, that is the plaintiff's misfortune.

⁽¹⁾ Law Rep., 2 Ch., 582.

⁽²⁾ Law Rep., 20 Eq., 140.

⁽³⁾ Law Rep., 2 Eq., 659.

JAMES, L.J.: It appears to me that the order of the Vice-Chancellor has been issued improvidently. There is an original suit by a foreign government against a defendant claiming some relief as against him—it does not signify what. The defendant, being sued by the foreign government, has filed, as he properly might do, a cross bill against the foreign government, and has named a person connected with that foreign government, and resident abroad, as a defendant to that cross bill, for the purpose of discovery. The Vice-Chancellor has thereupon made an order staying the original suit until both the defendants—the government which was the plaintiff in the original suit, and the person selected by the plaintiff in the cross suit—shall have appeared to that cross bill. And now it is said that this case is to follow exactly the analogy of what would be done in suits against corporations in England. I have not heard any authority cited, and I should be very much surprised if any authority could be found, that such a thing could be done even with regard to an English corporation, and an officer of that English corporation; that is to say, that the original suit should be stayed until that officer, or person who was named by the plaintiff in the second suit, has appeared and answered. Of course the person may determine for himself whether he will make discovery or not, but in many cases the corporation might have no power to compel him to do so.

In this court, with regard to persons in this country, it is open to a plaintiff in a cross suit to select any person he thinks fit for the purpose of discovery, and if that person is subject to the process of the court, the plaintiff can use the process of the court for the purpose of extracting from the defendant so selected whatever can *be got from him. [173] But if the plaintiff chooses to select somebody whom he cannot get to appear or answer, he does not thereby obtain a right to stop indefinitely the suit of the original plaintiff. He is at liberty to use the process of the court, and if he can enforce discovery he is at liberty to do so. That is all the court can do for a plaintiff in such a position, except that the court can, for the purpose of doing justice, say to the original plaintiff, "We will stop your proceedings until you have named some proper person to give the discovery which is sought by the defendant from you." That is the form of the order which was given at common law, and it is the form of the order given at this court, and is the form of the order which is prescribed by the rules under the Judicature Act. I believe there is no authority whatever either

with regard to an English corporation or plaintiff, or a foreign corporation or plaintiff, for staying the proceedings in the suit until a defendant selected by the plaintiff in a cross suit has entered an appearance in the cross suit.

I am of opinion that the order of the Vice-Chancellor ought to be discharged so far as it added to the order the name of the President of the Republic of Costa Rica. The other part of the order which stayed the proceedings till the Republic has appeared was quite right.

MELLISH, L.J.: The Vice-Chancellor's order in this case cannot be supported unless the defendants in the original suit are entitled as of right to compel the President of the Republic to give discovery and to answer the interrogatories that may be put to him.

I have no doubt that it is the duty of the court to see that justice is done, and that the proper person is appointed to make the discovery, but in my opinion it would be liable to very great abuse if the defendant was allowed to select any person he chose to give the discovery. He might select a friend of his own to give discovery, or he might select some person who would in all probability decline to give the discovery, and so he might get rid of the suit altogether.

I quite understand that there may be reasons, political or [174] of *dignity, which may make the head of a foreign government, whether president or king, unwilling to submit to the process of the court in giving discovery; and in all probability there is always some inferior officer who knows a great deal more about the matter than the President is likely to know.

It appears to me a very much more rational practice to say that the Republic is bound to produce some person who can give the proper discovery, but the defendants are not entitled to select whomsoever they choose. I believe there is no authority for saying that they have that right, and in my opinion we ought not to make a precedent to give it.

BLACKBURN, J.: I am of the same opinion. I do not think there is any complaint of the cross bill making the President a defendant if the President chooses to appear upon it. But the complaint here is that the Vice-Chancellor has stayed the proceedings in the original suit till the President does appear.

I do not see any reason why that should be done. I quite agree that where a foreign sovereign sues in this country he should, so far as the thing can be done, be put in the same position as a body corporate. The manner in which a corporation is to appear is provided for in Rules of Court, 1875,

Order xxxi., rule 4, adopting pretty nearly the practice of the common law before the act passed. [His Lordship then read the rule.]

Now where the body corporate suing is within the jurisdiction of this court, you can possibly make an order upon the corporation that one of their officers shall answer; but of course it would be absurd to make an order upon a corporation to direct an officer to answer who can know nothing about the matter. A discretion would be used in selecting the person who is likely to know and could answer accordingly.

I do not think that upon this point the sovereignty makes any difference when the corporation is out of the jurisdiction. The court could not enforce an order in any other way than by staying the suit till a proper person had been named, and that I apprehend to have been the state of things in the case of the *Republic of Peru v. Weguelin* (¹), where the Vice Chancellor Hall stayed the suit until a foreign sovereign had submitted to do what was right and proper by naming, *bona fide* and really and truly, the person who could give the discovery. It would answer all the purposes of justice if what the Vice-Chancellor Hall there did were to be adopted here. The plaintiff may select anybody he chooses, but he is not to say that in this case he will select the President, because the President, for reasons of dignity, as President Johnson did, might say, "I will not appear," and then this suit is to be stayed forever. It seems to me utterly unreasonable. It may be possible that when the application, as suggested, is made at Chambers it may turn out that this particular individual President of the Republic of Costa Rica is so completely the right person for discovery that the suit may be stayed till he consents to give the discovery. But all that we know at present is that the plaintiff has selected him, and for the reasons I have given, which substantially are the same as those given by the Lords Justices, he has no right so to do, and has no right to stay the suit until the President appears.

JAMES, L.J.: The appellants will have the costs of the appeal, but not the costs in the court below.

Solicitors for the Republic: *A. C. Edwards & Co.*

Solicitors for Emile Erlanger: *Bischoff, Bompas & Bischoff*.

(¹) Law Rep., 20 Eq., 140.

See ante, page 44; 12 Eng. Rep., 65 note; 13 id., 681 note.

The defendant, formerly president of

the Dominican Republic, while residing in New York, was arrested in an action against him by the plaintiff, for injuries

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sustained at the hands of defendant, as sovereign of San Domingo. Held, that the general rule that all persons and property within the territorial jurisdiction of a state are amenable to the jurisdiction of the courts, did not apply to such a case; that the fact that the defendant had ceased to be such presi-

dent did not destroy his immunity. The immunity of individuals from suits brought in foreign tribunals, for acts done within their own states in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of the nations: *Hatch v. Bacz*, 7 Hun, 596.

[Law Reports, 1 Chancery Division, 203.]

M.R., Nov. 17, 1875.

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*BIDDULPH V. WILLIAMS.

[1875 B. 58.]

Settlement—Joint Power of Appointment—Appointment to Trustees for Sale—Absence of Declaration of Trusts of Proceeds of Sale—Resulting Trust.

Under a settlement real estate was limited to such uses as A. and B. should by deed jointly appoint, and subject thereto to the use of A. for life, with remainder to the use of B. for life, with remainder to the first and other sons of B. in tail, with divers remainders over; and there was a power of sale vested in four trustees and exercisable at the request of A. and B., and the survivor of them. By a deed (which contained a recital that A. and B. were desirous of selling part of the settled property, and with a view to facilitate the sale and conveyance thereof to the respective purchasers, had agreed to execute the deed), A. and B., in exercise of the joint power of appointment, appointed part of the settled property to trustees upon trust for sale; and it was declared that the trustees should stand possessed of the proceeds upon the trusts intended to be declared by a deed of even date. No deed declaring the trusts was ever executed, and there was evidence to show that the deed of appointment was executed with the view of avoiding the trouble and expense of an application to the trustees to exercise the power of sale:

Held, that the disposition of the proceeds of sale was a question of intention; and that, both on the terms of the deed of appointment (independently of the evidence) and also having regard to the evidence, the proceeds of sale remained subject to the trusts of the settlement.

By indentures of lease and release dated the 25th and 26th of May, 1832, certain real estate was settled (subject to certain incumbrances) to such uses as Charlotte Myddelton Biddulph and Robert Myddelton Biddulph (the eldest son of Charlotte Myddelton Biddulph) should by deed jointly appoint, and in default of appointment, and subject thereto, to the use of Charlotte Myddelton Biddulph for her life, with remainder to the use of Robert Myddelton Biddulph for life, with remainder to the first and other sons of Robert Myddelton Biddulph successively in tail male, with divers remainders over. The release contained a power of sale vested in four trustees and exercisable at the request of Charlotte Myddelton Biddulph and Robert Myddelton Biddulph and the survivor of them; and the proceeds of any sale made under this power were to be invested in land to be settled to the same uses as the property sold.

*In the early part of 1843, Charlotte Myddelton Biddulph and Robert Myddelton Biddulph were desirous that part of the settled property should be sold; and it was considered most advantageous that it should be sold in a considerable number of lots. At this time the four trustees in whom the power of sale was vested were residing in different parts of the country, and Charlotte Myddelton Biddulph was far advanced in life and in an infirm state of health.

By an indenture dated the 25th of March, 1843, made between Charlotte Myddelton Biddulph and Robert Myddelton Biddulph of the one part, and William Wilson and Edward Williams of the other part, after reciting the said indentures of lease and release, and also reciting that Charlotte Myddelton Biddulph and Robert Myddelton Biddulph were desirous of selling and disposing of the several hereditaments described in the schedule thereto, and with a view to facilitate the sale and conveyance thereof to the respective purchasers of the same, had agreed to make and execute the indenture now in statement; it was witnessed that the said Charlotte Myddelton Biddulph and Robert Myddelton Biddulph, in exercise of the said power of appointment reserved to them, did thereby appoint that the hereditaments described in the schedule thereto should thenceforth remain, continue, and be to the use of the said William Wilson and Edward Williams, their heirs and assigns, upon trust for sale as therein mentioned; and it was thereby agreed and declared that William Wilson and Edward Williams, their heirs, executors, administrators and assigns, should stand possessed of the money to arise from the sale of the appointed hereditaments upon the trusts intended to be declared thereof by an indenture therein stated to be already prepared and intended to bear even date with, and to be executed immediately after the execution of, the indenture now in statement.

No indenture declaring the trusts of the proceeds of sale was ever prepared or executed.

Charlotte Myddelton Biddulph died on the 19th of August, 1843. Shortly after her death William Wilson and Edward Williams sold the larger portion of the appointed hereditaments, and paid the proceeds of sale, amounting to £11,006, to Robert Myddelton Biddulph. The remaining portion of the appointed hereditaments remained unsold.

*In 1846, doubts appeared to have arisen whether [205 the proceeds of sale had been properly paid to Robert Myddelton Biddulph, and he executed a deed dated the 1st of

September, 1846, by which he conveyed certain property to William Wilson and Edward Williams upon trusts, for securing to them an indemnity in respect of any liability they might have incurred, or might thereafter incur, by reason of having paid to Robert Myddelton Biddulph the sum of £11,006, or otherwise by reason of the trusts reposed in them by the indenture of the 25th of March, 1843.

Robert Myddelton Biddulph died on the 21st of March, 1872, having had issue Richard Myddelton Biddulph, his eldest son, and five other children. On the marriage of Richard Myddelton Biddulph the property comprised in the indentures of the 25th and 26th of May, 1832, was resettled, and now stood limited to the use of Richard Myddelton Biddulph for life, with remainder to his eldest son Robert Edward Myddelton Biddulph in tail.

Edward Williams survived William Wilson, and died in 1869, having by his will devised all estates vested in him as trustee to Edward Williams the younger and George Williams, whom he appointed his executors.

The bill in this suit was filed by the executor and trustee of the will of Robert Myddelton Biddulph against Edward Williams the younger, George Williams, Richard Myddelton Biddulph, Robert Edward Myddelton Biddulph, and the legal personal representatives of Charlotte Myddelton Biddulph, and prayed that it might be declared that the sum of £11,006 was rightly paid to Robert Myddelton Biddulph; and that he was at the time of his death absolutely entitled to the unsold portion of the appointed hereditaments; that Edward Williams the younger and George Williams might be ordered to sell the said unsold portion and pay the proceeds of sale to the plaintiff, or in the alternative to convey the said portion to the uses declared by the will of Robert Myddelton Biddulph of his real estate; and to reconvey the property comprised in the indemnity deed of the 1st of September, 1846, and to release the estate of Robert Myddelton Biddulph from such indemnity.

The suit now came on to be heard. As evidence of the intention of the parties to the deed of the 25th of March, 206] 1843, the *plaintiff put in evidence three letters which passed between Robert Myddelton Biddulph and Edward Williams, his solicitor and one of the trustees of the deed. The defendants waived any objection to the admission of these letters, which so far as material were as follows:

"Oswestry, April 22d, 1843.

"Dear Sir,—I have commenced the somewhat troublesome occupation of disposing of your chief rents and en-

croachments; and as I proceed in my labors, the necessity of making some provision for obviating the difficulties which would arise in the event of your mother's death becomes more apparent. I have already fully explained to you that your mother and yourself during your joint lives have full power to deal with the estate, including the chief rents and encroachments, as might be deemed advisable. In the event, however, of the death of either, such power will be at an end, and a title to the chief rents and encroachments could then be made only through the medium of the trustees of your marriage settlement, who are four in number. If I had at this moment effected sales of all the chief rents, &c., your mother and yourself might effectually convey to the purchasers, but as there would probably be two or three hundred of them, the task of signing so many deeds would necessarily be very irksome to your mother in her present infirm and (I fear) precarious state of health. If before the sales were effected your mother were to die, I need not point out to you the trouble and consequent expense that would arise by reason of the different deeds having to be executed by the trustees of your marriage settlement, who reside remote from hence and from each other. It is to be borne in mind, too, that the sales of the chief rents, &c., will be effected at different times and as occasion may serve, though I hope and trust to see all of them transferred to other hands before this time of another year shall have arrived. It would, however, be dangerous as regards your mother's health, and inconvenient with reference to future proceedings, to allow matters to remain in their present state; and it has occurred to me that it will be desirable for your mother and yourself immediately to execute the power contained in your marriage settlement for the purpose of taking the chief rents, &c., out of the operation of the settlement. *In doing this, and with a view of facilitating [207 future measures, I would beg to suggest that the chief rents, &c., should by the exercise of the power I have alluded to be vested in Mr. Wilson upon trust for sale, who could then execute conveyances to the different purchasers whenever necessary to do so, and without the trouble and expense of resorting to any other person. If you should concur in these views, and will be kind enough to let me hear from you to that effect, not a moment shall be lost in preparing the necessary deed for your mother and you to execute.

“EDW. WILLIAMS.

“Col. Myddelton Biddulph, Chirk Castle.”

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"My dear Sir,—I fully concur in the opinion that no time should be lost in excepting the chief rents from the operation of my marriage settlement. I also agree in the propriety of vesting them in some party for sale. I think Mr. Wilson *with yourself*—if you would undertake the task—would be the most satisfactory trustees. I propose this for your consideration, as I think I have heard of much difficulty arising in the event of the death of a single trustee. You may be sure I have no other motive. The deed to be prepared for my mother's signature will, I conceive, have reference to no other subject than that of the chief rents. In her present state of health it is most desirable no time should be lost. I have a very indifferent account by to-day's post, though not worse than the last . . .

"I am, my dear Sir, yours sincerely,

"R. MYDDELTON BIDDULPH.

"Chirk Castle, April 23d."

"Oswestry, April, 1843.

"Dear Sir,—I shall not have any objection to my name being associated with Mr. Wilson as trustee for sale of the chief rents and encroachments, and probably, for the reason you give, it would be as well that he should not stand alone.

"The deed necessary for taking the chief rents and encroachments out of the operations of your settlement, and vesting them in Mr. Wilson and myself for sale, is now preparing, and as your mother's health appears to be so uncertain and precarious, I am ²⁰⁸very anxious to have her signature procured to it without a moment's delay. I should therefore be much obliged if you would write to her explaining the nature of the deed, and requesting her to execute when my agent shall call upon her for the purpose of procuring her signature. If you could without inconvenience send me such letter by the bearer, or let me have it to-morrow morning, I will send it with the deed to my agent by the mail in the evening, and he could then call at your mother's house on Wednesday morning. I am the more anxious to see this deed executed, as, in case we should have to resort to the trustees of your settlement to complete the sales, much trouble, inconvenience, and expense would arise. The deed would refer only and exclusively to the chief rents, cottages, and encroachments, and will not affect any part of the ancient estate or any of the trusts or limitations in your settlement relating to the matter . . .

"EDW. WILLIAMS.

"Col. M. Biddulph, Chirk Castle."

Fischer, Q.C., and *Romer*, for the plaintiff: We submit that it was the intention of Charlotte Myddelton Biddulph and Robert Myddelton Biddulph to take part of the settled property out of the settlement, and make it their own. With that view, they execute a deed irrevocably appointing part of the property to trustees upon trust for sale; and they propose to declare trusts of the proceeds of sale of another deed. That deed is not executed. What is the effect of the absence of that deed? Simply this, that there is a resulting trust in favor of the persons making the appointment: *Sugden on Powers* (¹); *Chamberlain v. Hutchinson* (²); *Fosberry v. Smith* (³); *Garth v. Townsend* (⁴); *Brickenden v. Williams* (⁵); *Wilkinson v. Schneider* (⁶); *In re Davies' Trusts* (⁷); *Simmons v. Pitt* (⁸). In that case the appointors would be jointly entitled to the fund, and Robert Myddelton Biddulph, as the survivor, would take the whole.

As evidence of the intention of the parties, we rely on the letters, which show that the intention of the parties was to take the *property out of settlement. We also [209] rely on the payment to Robert Myddelton Biddulph; and we say that at this distance of time that payment must be presumed to have been properly made. It is true the trustees took an indemnity in 1846, but that is explained by the circumstance that in the absence of a deed declaring the trusts of the purchase-money, those trusts might be difficult to prove. No deed was, however, necessary. The donees of a power, given to them for their own benefit, chose to exercise it by appointing to trustees for sale. Their object was to take the property out of the settlement so as to make it their own, and effect must be given to their intention.

Cookson, Q.C., and *Freeling*, for the representatives of Charlotte Myddelton Biddulph, made no claim to the fund.

Chitty, Q.C., and *Harrison*, for Edward Williams the younger and George Williams.

Southgate, Q.C., and *Langworthy*, for Richard Myddelton Biddulph, and

Davey, Q.C., and *Smart*, for Robert Edward Myddelton Biddulph, were not called upon.

JESSEL, M.R.: The questions I have to decide are really two; and it is a very great comfort to me that, even assuming I am wrong on the first, I should certainly feel great confidence that I am right on the second.

(¹) 8th ed., p. 467.

(²) 22 Beav., 444.

(³) 5 Ir. Ch. Rep., 321.

(⁴) Law Rep., 7 Eq., 220.

(⁵) Law Rep., 7 Eq., 310.

(⁶) Ibid., 9 Eq., 423.

(⁷) Ibid., 13 Eq., 163.

(⁸) Ibid., 8 Ch., 978.

The first question that I have to decide is, whether, considering the terms of the original settlement of 1832 and the terms of the indenture of appointment dated the 25th of March, 1843, there is a resulting trust of the proceeds of the sale, as to which no trusts are declared for the appointors or for the persons entitled under the original settlement.

The second question is, whether, without assuming that there was or was not a resulting trust for either of the two sets of persons who would be interested, there is or is not sufficient contemporaneous evidence to show what the trust was.

210] *I have arrived at the conclusion, first of all, that according to the true construction of the deeds, the resulting trust is for the benefit of those who take under the settlement, and, secondly, that according to the true construction of the contemporaneous evidence, which is fortunately in writing, it was intended that the settlement should not be disturbed except so far as the substitution of money for certain outlying portions of the estate would necessarily interfere with it.

First, as regards the deeds independently of the contemporaneous evidence. The deeds of lease and release of 1832 were the common settlement of a family estate; the only singularity or exception from the ordinary form being, that the first tenant for life happens to be a lady instead of a gentleman. The successive tenants for life are mother and son, instead of, as is usually the case, father and son. These deeds settle family estates, subject to a joint power in the mother and son, to uses in what we call strict settlement, namely, to the mother for life, to the son for life, to his first and other sons in tail, with the ordinary powers, amongst which is a power of sale vested in four trustees, and exercisable at the request of the mother and son, and the survivor of them. We then find an indenture dated the 25th of March, 1843, the meaning of which must be ascertained not merely by the operative part but by the recitals. It is a deed made between the mother and son of the one part, and two persons, one of whom is the solicitor and the other the land agent of the son, of the other part. It recites the settlement of 1832, to show the limitations down to the life estate of the son, and then it goes on: "And whereas the said Charlotte Myddelton Biddulph and Robert Myddelton Biddulph are desirous of selling and disposing of the several messuages or tenements, cottages, lands, rents and hereditaments in the schedule subscribed to these presents mentioned, described, or referred to, and with a view to facilitate

the sale and conveyance thereof to the respective purchasers of the same, have agreed to make and execute these presents." Then there is an appointment to trustees upon the usual trusts for sale, with power of giving receipts, and there is a declaration that "William Wilson and Edward Williams, their heirs, executors, administrators and assigns, shall stand and be possessed of and interested in all the *money to arise or be produced from the sale of the [211] rents and hereditaments hereinbefore appointed upon the trusts intended to be expressed and declared of and concerning the same in and by an indenture already prepared, and intended to bear even date with and to be executed immediately after the execution of these presents." Two things are therefore clear from that deed, namely, first, that the object of the deed was not to enable them to sell and dispose, but simply to facilitate the sale and conveyance; and, secondly, that the disposition of the purchase-moneys was not intended to be made by this instrument. It was not a complete appointment in equity, but there was intended to be a further instrument which would complete the appointment by declaring the trusts. It is not, therefore, the case of a person having a general power of appointment making what he believes to be a complete appointment, or which he intends to be a complete appointment, but executing a deed for a specific purpose mentioned in the deed, and abstaining knowingly from declaring the trusts of the moneys to arise from the sale, leaving them to be declared by a separate instrument.

Now, what is the legal effect of that? It is emphatically a question of intention. You are to ascertain from the deed whether the appointor, or in this case the appointors, intended to deal with the beneficial interest, and then I suppose those authorities would have some application which say that when you conceive that a single appointor intended to destroy the ownership or the ownerships of the persons entitled under the settlement in default of appointment, there must be an intention to make the money his own, because it could be nobody else's. If a person has a general power of appointment, and appoints the fund to A. B., and for any reason A. B. cannot take, it may well be argued that the appointor had shown that the persons entitled under the settlement were not to take, whoever were to take, because there has been shown a complete intention to deprive them of all interest. That is an intelligible argument as to intention. But when you see that the parties do not intend by this deed to deal with the money, that is the bene-

ficial interest in the money, why are you to say that there is an intention to make it their own in the absence of that further instrument declaring that intention? It is an incomplete instrument so far as beneficial interest is concerned; but, besides that, *we have a statement that the object of the deed is not to enable them to dispose of the property, but is simply to facilitate the sale, that is to say, it is simply machinery for carrying out a sale. Taking, then, the recital that it is intended to be a part of the machinery for carrying out a sale, and the declaration that there is a future disposition intended to be made of the proceeds of sale (showing that they make no present disposition of the money), it seems to me that there is clear evidence that they did not intend to make the money their own by that document, but that they intended not to deal with the beneficial interest by that document, and consequently that the beneficial interest would fall to be dealt with by the original settlement, and the trusts, or resulting trusts, would be the trusts of that settlement. That might, in the case before me, possibly have given rise to a subsequent question, whether the money would have been considered to result on the same trusts as the purchase-money of estates sold under the power contained in the settlement, or whether the first tenant in tail born would take it absolutely.

I now come to consider the second point, and for that purpose it is not necessary to consider whether I am right or wrong in my construction of the deeds. The correspondence begins with a letter from the solicitor, Mr. Williams, of the 22d of April, 1843, the deed being subsequently executed, or at least I suppose it must have been subsequently executed, although apparently it is dated the 25th of March, 1843. As we know, dates are not to be relied upon, and I am satisfied that the deed was executed subsequently to the date of this letter. [His Lordship then read the letter, and continued:] What does that mean? The contingency he is going to provide against is the death of the mother, which will compel him to resort to the four trustees. If that event were to happen, he does not doubt that the trustees would consent to sell; but he says there are four of them, they reside at places remote from each other, and of course there will be labor and expense. What he wants to provide against, as he tells us, is the trouble and expense of having to deal with four trustees. There is not a suggestion that the distribution of the money is to be altered. He treats the execution of the deed he proposes as a mere sub-

stitution for an application to the *trustees to exercise [213 the power of sale; he proposes the execution of the deed with the object of avoiding trouble and expense, and he suggests it as an alteration in the machinery of carrying out the sale. The answer is this: [His Lordship read it.] Then we have a reply from the solicitor, also dated April. [His Lordship read it.] There is not a suggestion in this letter that there is to be any change in the disposal of the money. He knew, and everybody knew, that under the settlement the money must be reinvested in the ordinary way in the purchase of land. It is true that he speaks of the property being taken out of the operation of the settlement; but it appears to me, when the letter is fairly construed, it shows that he was telling Colonel Myddelton Biddulph that it was indifferent as far as essentials were concerned—that is, as far as regards the beneficial interest—whether the sale was carried out one way or the other. He says that if his mother dies without executing the deed it will cause trouble, inconvenience and expense, but there is not a suggestion that he would thereby lose the property, which is the theory put forward on the other side, it being alleged that it was intended he should have the proceeds of the sale solely for his own benefit.

I must say it is very satisfactory to my mind to see this contemporaneous written evidence, because it confirms the view which I had previously taken of the settlement. But I am bound to say I feel very much greater confidence in my judgment as regards the interpretation of this evidence than I do as regards the result of that judgment on the deeds if they had stood alone. In fact, if I may say so, I arrive at a conclusion with greater certainty on the second point than on the first. I am of opinion, therefore, that the plaintiff's case fails, and the bill must be dismissed.

Solicitors: *Hunter, Gwatkin & Co.; Dean & Taylor; Parkers.*

[Law Reports, 1 Chancery Division, 217.]

M.R., Nov. 27, 1875.

*EALES v. DRAKE.

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[1875 E. 70.]

Testamentary Power of Appointment—Fund—Excessive Appointment—Lapse—Hotchpot Clause—Life and Reversionary Interests.

The donee of a testamentary power of appointment over a fund of £7,000 exercised the power by appointing sums of £1,995, £4,000, £4,000, and £5, amounting in all to £10,000. The appointee of one of the sums of £4,000 died in the testator's lifetime :

1875

Eales v. Drake.

M.R.

Held, that the other appointees, and not the persons who would take in default of appointment, were entitled to the benefit of the lapse.

Life and reversionary interests must be brought into hotchpot under the usual hotchpot clause.

UNDER a deed dated the 6th of August, 1856, a sum of £10,000 charged on real estate was directed to be held upon trust for the children of Charles Thomas Eales in such shares, proportions, and manner as Charles Thomas Eales should by deed or will appoint, and in default of and subject to any appointment as to £5, part of the trust fund, for Harriet Sarah Eales (a child of Charles Thomas Eales), and as to the residue thereof for George Daniel Eales and John Thomas Eales (children of Charles Thomas Eales), in equal shares as tenants in common: and there was the usual hotchpot clause.

218] *By a deed-poll dated the 11th of December, 1860, Charles Thomas Eales appointed the sum of £3,000, part of the sum of £10,000, to George Daniel Eales.

By his will, dated the 11th of January, 1870, Charles Thomas Eales appointed £1,995, part of the £10,000, to Charles Eales; £4,000 further part thereof to George Daniel Eales; a second sum of £4,000, further part thereof, to trustees upon trust for John Thomas Eales for his life or until he should become bankrupt or incur the same, and after the determination of such interest, upon trusts for the benefit of the wife and children of John Thomas Eales; and £5, the remaining part thereof, to Harriet Sarah Eales.

By a codicil dated the 21st of July, 1871, Charles Thomas Eales revoked the trusts of the second sum of £4,000, by the will limited to take effect after the determination of the trust in favor of John Thomas Eales, and directed that from and after the determination of the last-mentioned trust, and subject thereto, the trustees should stand possessed of the second sum of £4,000 upon trust for Charles Eales, George Daniel Eales, and Harriet Sarah Eales, in equal shares as tenants in common.

Charles Thomas Eales died on the 24th of February, 1874.

George Daniel Eales on the 19th of February, 1874, in the lifetime of Charles Thomas Eales.

This suit was instituted for the purpose of ascertaining the rights of the parties interested in the sum of £10,000, and now came on to be heard.

The questions were, whether the appointees under the will of Charles Thomas Eales were entitled to be paid the sums appointed to them in full; and whether John Thomas

Eales was bound to bring into hotchpot the life and reversionary interests appointed to him by the will.

Chitty, Q.C., and *Chapman Barber*, for Charles Eales, said that as regards the first point there appeared to be no decision; but they submitted that the appointees, and not the persons entitled in default of appointment, must benefit by the lapse caused by the death of George Daniel Eales.

**Bagshawe*, Q.C., and *Cracknall*, for John Thomas [219 Eales, referred to *Page v. Leapingwell* (1); *Easum v. Appleford* (2).

Langworthy, for the other parties, submitted that John Thomas Eales must bring into hotchpot the interests appointed to him by the will: *Rucker v. Scholefield* (3).

JESSEL, M.R.: I shall say a few words on the first point, as there appears to be no authority which covers it.

The case is this. A testator, having power to appoint £7,000 by will, thinks he has power to appoint £10,000; and accordingly makes a will appointing sums of £1,995, £4,000, £4,000, and £5. If nothing more had happened it is quite clear that all these gifts must have abated, because there is not enough to pay the bequests in full. But one of the appointees has died, which augments the fund, exactly in the same way as if the testator had given pecuniary legacies of greater amount than his whole personal estate; and then one of these legatees had died. In that case the personal estate would have been augmented for the benefit of the other legatees, and the appointees here are in the same position.

As regards the other point, it is quite clear that both life interests and reversionary interests must be brought into hotchpot. The value of them must be ascertained in the best way you can; and if you cannot agree, there must be an inquiry at Chambers on the subject.

Solicitors: *Dobinson & Geare; Benbow & Saltwell.*

(1) 18 Ves., 463.

(2) 5 My. & Cr., 56.

(3) 1 H. & M., 36.

[Law Reports, 1 Chancery Division, 226.]

M.R., Dec. 11, 1875.

*In re BREEDS' WILL.

[226

Maintenance—Interval between Twenty-one and Twenty-five—Advancement or Benefit of Child—Education—23 & 24 Vict. c. 145, s. 26.

A testator directed his trustees to pay to his widow the sum of £100 per annum for the maintenance and support of each of his children until he or she should attain twenty-one, with power to increase or decrease such allowance; and he empowered

his trustees, with the consent of his widow, to advance any sums not exceeding in the whole one-fourth of the presumptive share of any child for his or her placing out or advancement in life, or otherwise for his or her benefit; the residue to be held in trust for all the children of the testator, who being sons should attain twenty-one, or being daughters should attain twenty-five or marry, without any provision for the maintenance of unmarried daughters during the interval.

On a petition by the trustees, under Lord St. Leonards' Act, for the opinion of the court :

Held, that the trustees had no power either under 23 & 24 Vict. c. 145, s. 26, or by way of interest on their contingent shares, to allow maintenance to unmarried daughters during the interval; but that the advancement clause enabled them to advance the necessary sums of money for the purpose.

Semle, if the testator's estate were being administered by the court, interest on their contingent shares would have been given by way of maintenance:

Held, also, that the trustees would be justified in increasing the allowance for infant daughters of the testator so as to meet the expenses of education, as included in maintenance and support.

JAMES BREEDS, by his will, dated the 30th of January, 1867, directed his trustees to stand possessed of his residuary personal estate upon trust to pay to his wife the yearly sum of £500 during her widowhood, reducible to £100 in the event of her marrying again; and the testator continued: "And upon further trust to pay and allow to my said wife during her widowhood the sum of £80 per annum for the maintenance and support of each of my children which shall be under the age of ten years at my decease, until they shall respectively attain that age, and for each child which shall be, or shall successively arrive at, that age the sum of £100 per annum, for the maintenance and support of each such child until he or she shall attain the age of twenty-one years, if my said trustees shall think it expedient so to do. Provided always, and I hereby declare, that it shall be lawful for my said *trustees or trustee, if necessary in their or his opinion, to increase or decrease such allowance at their or his discretion, whether such child or children shall reside with or be supported by my said wife or not; and that it shall also be lawful for my said trustees or trustee for the time being, at their or his discretion, and with the consent of my said wife during her widowhood, to advance any sum or sums of money, not exceeding in the whole one-fourth part of the capital of the presumptive share of any such children of mine, in or towards the placing out or advancement in life, or otherwise for the benefit of such child or children, as my said trustees or trustee shall in their or his discretion think proper." And subject to the said trusts the testator declared, that his trustees or trustee should stand possessed of the fund upon trust for all his children, who being sons or a son should attain the age of twenty-one years, or being daughters

or a daughter should attain the age of twenty-five years, or marry under that age, in equal shares.

The will contained no provision for the maintenance of unmarried daughters of the testator during the interval between twenty-one and twenty-five.

The testator died on the 14th of September, 1875, leaving his wife, Ann Breeds, and nine children, namely, three sons, aged 23, 14, and 14; and six daughters, aged 23, 21, 18, 16, 15, and 11, who were unmarried and residing with their mother.

The testator's residuary estate was of the estimated value of £100,000, and was producing an income of about £4,000.

The petition was presented by the trustees under Lord St. Leonards' Act, praying the opinion of the court as to whether they might lawfully and properly make an annual allowance for her maintenance and support to each of the daughters for the time being between the ages of twenty-one and twenty-five, and unmarried, and an annual allowance to Mrs. Breeds for the education of her infant daughters, in addition to the allowance for the maintenance and support of each such daughter payable under the will.

Chitty, Q.C., and *Gaselee*, for the petitioners: According to the true construction of the will, each unmarried daughter takes a vested interest in her share of resi- [228] due, payment only of her share being deferred until she attains twenty-five or marries: *Davies v. Fisher* (*). The testator has omitted to give maintenance during the interval. Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 26) does not reach the case, as the persons requiring maintenance are of full age; but interest might be given by way of maintenance: *Chambers v. Goldwin* (*); *Martin v. Martin* (*); though it has been thought that this rule does not extend to adults whom the parent, if living, would be under no obligation to support: *Roper on Legacies* (*). At any rate, the difficulty may be got over by the trustees, with the consent of the widow, advancing out of capital the necessary sums for the purpose.

Upon the second question, they submitted that the trustees would be justified in increasing the allowance to the widow for each infant daughter, so as to meet the expenses of her education.

(*) 5 Beav., 201.

(*) Law Rep., 1 Eq., 369.

(*) 11 Ves., 1.

(*) 4th ed., p. 1270.

JESSEL, M.R.: I think the power of maintenance which, by sect. 26 of Lord Cranworth's Act (23 & 24 Vict. c. 145), is given to the trustees stops short at minority, and does not apply to the interval between twenty-one and twenty-five.

When the court is administering the estate of the parent, it will, where the contingencies are equal, and the adult children, if any, consent, apply the income of the presumptive shares of the infant children for their maintenance. But this is a rule of the court, and does not enable trustees so to apply the income where the estate is not under administration. If there were a suit to administer the estate, I am clear that I could do what is required; but the trustees cannot. I think, however, that with the consent of the mother, they may do it under the power of advancement; for the words "in or towards the placing out or advancement in life or otherwise for his or her benefit" are large words, as I recently decided in *Lowther v. Bentinck* ⁽¹⁾.

Upon the second question, I am of opinion that the trustees *may increase the allowance to Mrs. Breeds for each of her infant daughters, in order to meet the expenses of their education, for that is included in their maintenance and support.

Solicitors: *Kingsford & Dorman*, agents for *Phillips & Cheesman, Hastings*.

⁽¹⁾ Law Rep., 19 Eq., 166.

[Law Reports, 1 Chancery Division, 229.]

M.R., Dec. 11, 1875.

In re WILCOCKS' SETTLEMENT.

Absolute Interest in Personal Estate—Limitation over in case of Intestacy—Repugnancy.

A fund was settled in trust for W., the illegitimate daughter of the settlor, for life, and in the event, which happened, of her not at her death being under coverture, for her absolutely; with a proviso that if any estate, interest, or benefit should, under the powers and provisions of the settlement, be undisposed of, or in the events which should happen would but for the proviso be held in trust for the Crown, or belong beneficially to the Crown, then and in every such case the estate, interest, or benefit should belong to and be held in trust for her father for life, and after his death, for her mother. W. having died intestate, the Crown claimed the fund:

Held, that the fund vested absolutely in W. at her death, and that the gift over was repugnant and void; and consequently that the Crown was entitled to the fund.

By an indenture dated the 28th of March, 1874, a sum of money belonging to James Carrall Wilcocks was settled upon trust for Celia Wilcocks, spinster, during her life, and

after her decease, for her children by any marriage as therein mentioned; and it was declared that in case she should not marry, or in case there should be no issue of her in whom the trust fund should become absolutely vested, the trust fund and its accumulations should be held upon the following trusts, that is to say, if Celia Wilcocks should not at her death be under coverture, in trust for her, her executors, administrators, and assigns; but if she should at her death be under coverture (which event did not happen), then upon the trusts therein mentioned.

The indenture then continued: "And if any estate, interest, or benefit shall under the trusts, powers, and provisions of these presents be undisposed of, or in the event which shall happen would, but for this proviso, be held upon trust for the Crown, or belong beneficially to the Crown, or to the trustees or trustee *of these presents, then, and in [230 every such case, the said estate, interest, or benefit shall belong to, and be held in trust for, the said James Carrall Wilcocks and his assigns during his life, and after his decease, in trust for the said Celia Douglas Wilcocks, her executors, administrators, and assigns."

James Carrall Wilcocks died in April, 1874.

Celia Wilcocks, who was the daughter of James Carrall Wilcocks by his wife Celia Douglas Wilcocks, but was born before their marriage, and consequently illegitimate, died in August, 1875, intestate and without having been married, and letters of administration to her estate and effects were granted shortly afterwards to the nominee of the Crown.

The Crown having claimed the fund it was paid into court by the trustees, and Celia Douglas Wilcocks presented a petition for payment of it out to herself.

Marten, Q.C., and *Warmington*, in support of the petition: The fund is claimed by the Crown as *bona vacantia*, but this it cannot be, by reason of the limitation over. It will be argued that as the gift to Celia Wilcocks became absolute on her decease, the limitation over is repugnant and void: *Holmes v. Godson* (1), overruling *Doe v. Glover* (2). But effect must be given to the intention, which manifestly was that Celia Wilcocks should take a life interest only, with a power of appointment by will, the fund being limited in default to the petitioner and her late husband.

Rigby, for the Crown, was not called upon.

Ince, Q.C., for the trustees of the will.

(1) 8 D. M. & G., 152.

(2) 1 C. B., 448.

JESSEL, M.R.: This is an extremely simple gift. It is an absolute gift, in a particular event, to a lady who happened to be illegitimate. The event happened, she died a spinster, and consequently was absolutely entitled to the property at her death. Immediately following the absolute gift there is this singular proviso: [His Lordship read the clause set out above, and continued:] It is a clause purporting to deal with property of Miss Wilcocks which would but for the proviso be held in trust for the Crown, or belong beneficially to *the Crown. But it is not the case that the fund would be held in trust for the Crown but for that proviso. It was the lady's absolute property, and could only be held in trust for the Crown in case she happened to die intestate. This proviso therefore amounts to this—that the fund is limited over in the event of her dying intestate. The question I have to decide is whether such a limitation can be supported. I think it cannot. The law of England has from the earliest times prohibited the introduction of new modes of devolution of property by operation of law. Of course a man can direct his property to go according to any series of limitations that he pleases, but he cannot create a new mode of devolution by operation of law. If there be a gift in fee, for instance, the donor cannot say that in the event of the donee dying intestate, the estate shall descend not to his eldest but to his youngest son. In *Ross v. Ross* (¹) Sir Thomas Plumer said: "The question, I think, is, whether this will vests the absolute property of the legacy in the legatee. If it do give the absolute property, the right of disposing of it, or its devolution upon his representatives, would follow as a matter of course." That is, if a man give the property itself, it must devolve according to law, if not disposed of by the donee in his lifetime. A similar point arose in *Holmes v. Godson* (²), where Lord Justice Turner said: "The law has said that if a man dies intestate, the real estate shall go to the heir and the personal estate to the next of kin"—meaning the person, whoever he may be, who takes personal estate in the event of intestacy—"and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void." That is, a man cannot give property absolutely, and at the same time say it shall not devolve according to law.

I therefore decide that the proviso is void as repugnant to law, and as a consequence, that the Crown is entitled to the

(¹) 1 Jac. & W., 154.

(²) 8 D. M. & G., 152, 165.

fund. The proper form of order will be, that the court being of opinion that Miss Wilcocks was absolutely entitled at her decease, order the fund to be paid to her legal personal representative.

Solicitors: *Yarde and Loader; The Solicitor to the Treasury.*

[Law Reports, 1 Chancery Division, 232.]

M.R., Dec. 18, 1875.

**In re COTTON.*

[232]

Infant—Maintenance—Contingent Interest—23 & 24 Vict. c. 145, s. 26.

Trustees may, under 23 & 24 Vict. c. 145, s. 26, apply for or towards the maintenance of an infant the income of property held on trust for the infant contingently on attaining the age of twenty-one years.

Where a fund was bequeathed upon trust for all the children of A. who should attain twenty-one in equal shares, and if there should be but one such child, then for that child, and A. died leaving one infant child:

Held, that the income of the fund might be applied in the maintenance of the child.

ELIZA COTTON, by her will, dated the 11th of March, 1870, gave certain legacies, and bequeathed the residue of her estate to trustees upon trust as to one moiety thereof to pay the annual income to her niece, Jane Jackman, during her life for her separate use, and after her decease to stand possessed of such moiety, and the income to arise therefrom, upon trust for all her children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares; and if there should be but one such child, then upon trust as to the whole of such moiety for that child; and if no child should live to attain a vested interest, then over. The will contained no power of maintenance.

The testatrix died in May, 1870. Her residuary estate was of the value of £3,500, and was invested on mortgage producing an annual income of £170.

Jane Jackman died in August, 1875, having had one child only, a daughter, who was of the age of seven years at the date of the petition.

George Jackman, the father of the infant, being in such circumstances that it would be impossible for him to bring up and educate her unless some allowance was made to him by the trustees for her maintenance and education out of the income of her expectant share of the residue, a petition was presented by the trustees, under Lord St. Leonards' Act, praying the opinion of the court as to whether they would be justified in making such allowance to her father.

233] **Jason Smith*, for the petitioners: The petition is presented in consequence of doubts which have been expressed, but which it is submitted have no foundation, as to sect. 26 of Lord Cranworth's Act (23 & 24 Vict. c. 145) applying to cases like the present, where the income of the expectant share is not vested: *Lewin on Trusts* ('); *Davidson's Prec. Conv.* (').

JESSEL, M.R.: With every respect for the learned gentlemen of whose opinions I have been told, I must say that they have done their best to repeal this section. Lord Cranworth's Act (23 & 24 Vict. c. 145) really extends to all infants the benefit which, in *Chambers v. Goldwin* (') and other cases, the court had extended to infants for whom a provision had been made on the contingency of their attaining twenty-one by a parent or a person standing *in loco parentis*. In cases where the person making the provision was a parent or stood *in loco parentis*, the court held that the attaining of twenty-one was put in simply to fix the time of payment, and not to deprive the child of the benefit in the meantime, and accordingly it gave the income by way of maintenance. But it declined to extend the rule to other cases, and, consequently, the Legislature intervened and enacted that in all cases where property is held in trust for an infant, either absolutely, or contingently on his attaining twenty-one, it shall be lawful for the trustees, at their sole discretion, to pay to the guardians, if any, of such infant, or otherwise to apply for or towards the maintenance and education of such infant, the whole or any part of the income to which such infant may be entitled of such property. The difficulty has arisen on the word "entitled," which is said to mean "indefeasibly entitled;" and I agree that "may be or become entitled" would have satisfied the conveyancers better. When property is held on trust for an infant contingently on his attaining twenty-one, the infant is not entitled, strictly speaking, to the income any more than to the capital. If he attains that age he will get both. In fact he is entitled to both, subject to the contingency of 234] his dying under twenty-one. I am clearly of *opinion, therefore, that the trustees may apply a moiety of the income for the maintenance of the infant, and may pay it to her father, for I think the expression "guardians" in the section includes the father, as guardian by nature.

Solicitors: *R. S. Taylor & Son.*

(') 5th ed., p. 419.

(') 3d ed., vol. iii., p. 177.

(') 11 Ves., 1.

[Law Reports, 1 Chancery Division, 234.]

M.R., Dec. 20, 1875.

BURTON V. NEWBERY.

[1861 B. 138.]

Will—Codicil—Gift to attesting Witnesses—Subsequent Codicil referring to Will—Republication.

A codicil, which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil.

Gordon v. Lord Reay ⁽¹⁾ dissented from and not followed.

A testator made a will (dated before the Wills Act), by which he directed his residuary real estate to be sold and the proceeds to be divided (in the events which happened) among twelve persons, of whom A. and B. were two. He made a first codicil (dated after the Wills Act), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. and B. He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:

Held, that the second codicil did not operate as a republication of the first codicil; that the gifts to A. and B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between A. and B. and the other ten residuary legatees.

JOSHUA MALDEN, by his will, dated the 7th of December, 1837, and duly attested, devised certain real estate, specifically described, and all and singular other his messuages, lands, tenements, hereditaments, and real estate to George Newbery and John Ryland, and their heirs upon trust to receive the rents and profits thereof during the lives of his daughters, Elizabeth Burton and Mary Morton, and apply such rents upon the trusts therein mentioned, *and [235 from and after the decease of Elizabeth Burton and Mary Morton upon trust to sell the same, and hold the proceeds of sale upon the trusts of his (the testator's) residuary personal estate; and the testator thereby bequeathed his residuary personal estate upon certain trusts during the lives of Elizabeth Burton and Mary Morton; and after their death he directed the same to be equally divided between such of his thirteen grandchildren therein named (two of whom were William Burton and Ann Burton) as should being grandsons attain twenty-one, or being granddaughters attain that age or marry.

By a codicil dated the 12th of October, 1838, and attested by Elizabeth Burton, William Burton, and Ann Burton, the testator directed that the rents of certain real estate purchased by him on the 13th of July, 1838, and the 10th of October, 1838, should be disposed of in the same manner as the rents of all his other estates; and he further desired

⁽¹⁾ 5 Sim., 274.

that his executors should sell such real estate, and dispose of the proceeds in the same manner as the moneys arising from all his other estates.

The testator made another codicil, dated the 1st of April, 1839, and in the following terms: "This is a codicil to my last will dated 7 December, 1837: and I hereby give and bequeath unto my daughter Elizabeth Burton £600, which I desire my executors to pay to her within twenty-four months after my decease." This codicil was duly attested by two witnesses.

The testator died shortly after the date of the last codicil. Of the thirteen grandchildren named in the will, twelve (including William Burton and Ann Burton) attained twenty-one.

The suit was instituted for the administration of the trusts of the testator's will, and now came on to be heard on further consideration. Elizabeth Burton and Mary Morton were both dead; the testator's real estate had all been sold; and the question was, whether the testator had effectually devised to William Burton and Ann Burton two twelfth shares of the proceeds of the property comprised in the codicil of the 12th of October, 1838.

Waller, Q.C., and Hamilton Humphreys, for William Burton and Ann Burton: The codicil of the 1st of April, 236] 1839, is a republication of the *will, including the prior codicil of the 12th of October, 1838, which must be taken to be validly attested for all purposes. The law is thus laid down in *Jarman on Wills* ('): "In applying the doctrine that a reference in a codicil to the prior of two wills as the actual will of the testator sets it up against a posterior will, it is necessary to bear in mind that every codicil is a constituent part of the will to which it belongs; for in a general and comprehensive sense, a will consists of the aggregate contents of all the papers through which it is dispersed; and, therefore, where a testator in a codicil refers to and confirms a revoked will, it is not necessarily to be inferred that he means to set up the will (using the word in its special and more restricted sense) in contradistinction to, and in exclusion of, any intermediate codicil or codicils which he may have engrafted on it. He is rather to be considered as confirming the will with every codicil which may belong to it." In support of this proposition the author cites *Crosbie v. MacDoual* (') and *Gordon v. Lord Reay* ('), the latter of which cases is precisely in point here; and the

(1) 3d ed., vol. i., p. 175.

(2) 4 Ves., 610.

(3) 5 Sim., 274.

doctrine there laid down is supported by *Pigott v. Waller* (1) and *Anderson v. Anderson* (2). Moreover, the first codicil gives by reference to the will, and the other legatees can take no greater share in the property devised by the codicil than they would have done if it had been devised by the will; they cannot take any benefit under the will without giving effect to all the dispositions of the testator.

Chitty, Q.C., and *Everitt*, for some of the other grandchildren, referred to *Aaron v. Aaron* (3); *Winter v. Winter* (4); *Farrer v. St. Catharine's College* (5); *In the Goods of Reynolds* (6); and submitted that the gift to William Burton and Ann Burton of two twelfth shares of the property specifically devised by the first codicil failed; and that these shares must fall into the residue and be divided in twelfths between William Burton, Ann Burton, and the other ten grandchildren who attained twenty-one.

**Southgate*, Q.C., *Shebbeare*, *Joliffe*, *Stallard*, *White*—[237 *horne*, and *F. W. Stone*, appeared for other parties.

JESSEL, M.R.: The case I have before me is one of some little singularity, and perhaps of some novelty, and it compels me to consider some of the prior authorities, and to say how far they appear to me to be consistent with principle. The 15th section of the Wills Act in effect makes void any gift by a testamentary instrument to attesting witnesses and certain other persons, such as the wives and husbands of attesting witnesses; but it does not in any other way affect the validity of the testamentary disposition. If, therefore, a testator makes a testamentary disposition containing a gift to the attesting witness, the attesting witness takes nothing under it.

This particular testator having made his will on the 7th of December, 1837, before the Wills Act, made a first codicil, which bears date the 12th of October, 1838, and thereby gave benefits to the attesting witnesses. It is clear, if nothing more had been done, that those benefits would not have been taken by them. He then made a second codicil, not, however, calling it a second codicil, which bears date the 1st of April, 1839, and it is in these terms: [His Lordship read it as set out above.] The first point raised on behalf of the claimants is this: they say that the effect of this second codicil is equivalent to a re-execution of the first codicil, in other words, that the second codicil is not only equivalent to the re-execution of the will standing alone, but of the will

(1) 7 Ves., 98.

(2) Law Rep., 13 Eq., 381.

(3) 3 De G. & Sm., 475.

(4) 5 Hare, 306.

(5) Law Rep., 16 Eq., 19.

(6) Law Rep., 3 P. & M., 35.

plus the first codicil, and the question I have to decide is, whether that is the effect of the second codicil. I wish I could say that the law on the subject was clear; that it was perfectly consistent with principle; and that the authorities were not to a great extent conflicting. I cannot say so; but I can say what is my opinion of the law derived from those conflicting authorities, and having regard to principle.

Now it appears to me that any testamentary instrument properly attested may incorporate into it by reference as a part of the testamentary instrument any prior writing, whether such prior writing be attested or not, and that if the 238] incorporation is made *in such a manner that the court can find out from the properly attested instrument what is the prior instrument intended to be referred to, then the prior instrument becomes a part of the testamentary instrument to all intents and purposes.

That I take to be the principle, and the question is whether such reference is necessary. I think it is, and as I read the judgment of Baron Bayley, in the case of *Doe v. Evans* ⁽¹⁾, he puts the law very much in the way I have stated. The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet, and the learned judge says: "Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up." In other words, the mere fact of its being a codicil alone will not do; it must refer in some shape or another to the instrument which is set up. In the case of *Aaron v. Aaron* ⁽²⁾, which came before Vice-Chancellor Knight Bruce, he recognized the authority of *Doe v. Evans*. Whether he also intended to recognize the authority of *Gordon v. Lord Reay* ⁽³⁾ I am not sure. After reading at length the judgment of Baron Bayley in *Doe v. Evans*, he says ⁽⁴⁾: "Now, it can make no difference whether the codicil be written on the same paper with the will or written at a subsequent period or not. Here a codicil is referred to, and there is no dispute what the instrument was." Then he reads the codicil at full length, and you find that it begins thus: "Whereas I, John Aaron, have made and duly executed my last will and testament in writing, bearing date the 23d day of August, 1828, and also a codicil annexed thereto, bearing date the 21st of May, 1831." Then he says, "It is perfectly clear, in my opinion, what the instrument here mentioned is." Of course; it was de-

⁽¹⁾ 1 Cr. & M., 42.

⁽²⁾ 3 Do G. & Sm., 475.

⁽³⁾ 5 Sim., 274.

⁽⁴⁾ 3 Do G. & Sm., 479.

scribed as a codicil. Then he goes on, "The intention of the second codicil, as collected from the whole of it, was to confirm the first codicil. That is done by an instrument duly attested. Now, whatever I might have thought of this question independently of the case of *Gordon v. Lord Reay*, and the observations of Bayley, B., in the case in the Exchequer, I must, if I am to decide myself without having the opinion of a court of law, say *that the effect of [239 the will and second codicil was to place the first codicil in the same situation as if it had been attested by three witnesses." He does not say there whether he does or does not approve of *Gordon v. Lord Reay* ('); but these two cases of *Doe v. Evans* (') and *Aaron v. Aaron* (') are entirely in accordance with what I consider to be the principle, which is, that the setting up instrument must contain a distinct reference to the prior writing, so as to show that the testator intends that prior writing to be a part of his testamentary disposition.

Gordon v. Lord Reay is a case very difficult to deal with. In argument, undoubtedly the point was taken by Sir Edward Sugden for the defendants. He says that an instrument duly attested can only republish an instrument not duly attested to which it expressly refers.

In *Gordon v. Lord Reay* there was a codicil, which, as the law then stood, was perfectly valid as regarded personal estate; but it was not valid as regarded real estate for want of due attestation. Then there was a second codicil, which was in these terms: "Whereas I have in and by my last will and testament, bearing date the 17th of August, 1812, made several provisions and bequests in favor of Susan Harriet Hope," &c., "now I do hereby confirm such bequests and provisions," "and I do hereby ratify and confirm this by my hand and seal, dated the 13th of August, 1818," and there is nothing more. A reference is made to provisions made by the will, with the date of it, and a confirmation is made of those provisions. The testator had also made substantial provisions for the lady by the first codicil, but I confess I cannot find, on the face of the second codicil, any reference whatever to the first codicil, nor can I find any reference to any will which would include the codicil, because the only will referred to is a will bearing date the 17th of August, 1812, which was the date of the original instrument, and the codicil was dated the 8th of April, 1814. Therefore it is not (as was put to me in argument) the case of a man saying simply "I confirm my will," and it being

(') 5 Sim., 274.

(') 1 Cr. & M., 42.

(') 3 De G. & Sm., 475.

held that the term "will" included every testamentary disposition, whether contained in a thing called a will as dis-
 240] tinct from a codicil, or in *a thing called a will, being a will *plus* several codicils. The only reference was to a will bearing date a certain day, that is, as I understand it, to a described instrument, which excludes instruments of subsequent date. I am obliged to say this, because I admit that the decision was the other way. Unfortunately we have no reasons given. The judgment of the Vice-Chancellor is in these terms: "My opinion is that the second codicil does republish the first. The first codicil is part of the will." [It was part of the will for the purpose of the personal estate, but not part of the will for the only purpose for which the Vice-Chancellor had to consider it—that is as regarding real estate.] "And if the second codicil is a republication of the will, it is a republication of everything which is part of the will. The second codicil does refer to the will; it ratifies and confirms the will, and everything that is part of it." It does appear to me that that is a fallacy, that where you describe a will by its date you do not describe the subsequent codicil as being included in that will. It may well be, that where you describe a will generally, without date, and say, "I confirm my will," you might interpret the word "will" as including the whole of the testamentary disposition; but it does appear to me that that was not the case in *Gordon v. Lord Reay* (*), and I cite, in reference to this point, the observations made in the case of *Crosbie v. MacDoual* (*), and those made by Lord Selborne in the recent case of *Farrer v. St. Catharine's College* (*). They both go to this, that a mere reference to an instrument with a date is not a reference to the subsequent instrument. The point in *Crosbie v. MacDoual* was this: The testator made a will; he then made several codicils, the fourth of which revoked certain annuities given by the will, and then, last of all, he made a codicil confirming the will, but not all the codicils, and the question was whether he had revived the gift which had been revoked by the intermediate codicil. It was held he had not: and the then Master of the Rolls distinguished the case from the case of *Lord Walpole v. Lord Orford* (*), where a man having made two wills, and unfortunately not having destroyed the first, made a codicil, and the transcriber having the first will be-
 241] fore him, as well as the second, by mistake *(of which they would not allow evidence to be given), confirmed the

(*) 5 Sm., 274.

(*) 4 Ves., 610.

(*) Law Rep., 16 Eq., 19.

(*) 3 Ves., 402.

first will, which was inconsistent with and had been revoked by the second; and it was held that the confirmation of the first will, though it had been revoked, set it up again. It was a writing which, though revoked and good for nothing, was as much incorporated by the codicil as though it had been written out again in words, and consequently it revoked the intermediate and inconsistent will. But, as pointed out by the Master of the Rolls, that does not apply to a will and codicil followed by a second codicil inconsistent with the prior codicil; there is no occasion in such a case to assume that you do revoke the intermediate codicil. So in a case where you make a will with subsequent codicils, you may intend merely to revoke the will, and leave the codicils standing, which was the decision in *Farrer v. St. Catharine's College*(¹). There, the argument was pressed that the revocation of a will, being the revocation of everything which is part of it, must revoke all the codicils. The answer was, you do not revoke the will in that sense, but you revoke an instrument called a will of a certain date; therefore the revocation does not go beyond that. I must say it does not appear to me that the case of *Gordon v. Lord Reay*(²) was decided according to principle, and that the true principle was that which was laid down by Baron Bayley in *Doe v. Evans*(³), which has been certainly followed, whereas I am not able to find that the case of *Gordon v. Lord Reay*, though quoted, has ever been followed at all.

Then there is a second point, which is this: The codicil gives certain after-acquired lands substantially on the same trusts on which the testator had given the residue of his real estate. According to the doctrine now established by *Christie v. Gosling*(⁴) you are to read the words referred to as if they were incorporated in the instrument. The consequence would be that the attesting witness would take a share of the money to arise from the sale of the lands; but then that share is forfeited by the law. What becomes of it? It falls into the residue. Any lapsed or void gift falls into the residue, and consequently the shares of the attesting witnesses will be divided among all the residuary legatees. But it was said that the residuary legatees [242 cannot take under the first codicil, which directs the money to be divided in accordance with the provisions of the will without carrying out all these provisions. That appears to me to be a fallacy. It is not, in fact, a case of election at all, they take simply what is given to them by the instrument. The

(¹) Law Rep., 16 Eq., 19.

(²) 5 Sim., 274.

(³) 1 Cr. & M., 42.

(⁴) Law Rep., 1 H. L., 279.

dispositions of that instrument are not effectual to the extent to which a share of the property is given to the attesting witness, not by reason of the terms of the will or codicil, but by reason of the law which annuls the gift. You have, therefore, to look, not at the meaning of the codicil, but to the effect of the codicil with the addition of the statutory enactment which annuls a portion of its effect, and you have to read it in exactly the same way as if these persons had been excepted from the portion of the will incorporated by reference, consequently they can by no possibility be held to take anything under such words of reference. Therefore I hold that their shares are simply void gifts and fall into the residue, and are divisible among them as well as the other residuary legatees.

Solicitors: *Johnson & Weatheralls; Rhodes & Son.*

See 14 Eng. R., 536 note.

The attesting witnesses to a will must be competent at the time of attestation. The executor named in a will, as also his wife, is a competent attesting witness, if he takes no beneficial interest under it. The fees and commissions

to which an executor is by law entitled in this state, do not constitute such a beneficial interest as to render him or his wife incompetent to attest the execution of a will: *Stewart v. Harriman*, 56 N. H., 25.

[Law Reports, 1 Chancery Division, 243.]

V.C.M., Nov. 12, 18, 19, 1875.

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*ASHLEY V. ASHLEY.

Old Administration Suit—Deficient Estate—Funds subsequently coming in—Vested Rights of Original Creditors—Apportionment of Fund.

Where, in the case of a deficient estate, the creditors have been ascertained, and the available assets divided amongst them, and at a subsequent period further funds come in belonging to the estate, and some only of the creditors or their representatives appear in answer to advertisements, those who so appear are only entitled to the proportions of the fund distributable which their debts bear to the entire liabilities of the estate, and the remainder must be retained to meet any future claims by the other creditors.

THIS was a petition seeking for distribution of certain funds standing in court and now claimed by the representatives of some of the persons who were creditors of one Charles Pitfield, who died in the year 1740.

Shortly after the death of Charles Pitfield the present suit was instituted for the administration of his estate, and a decree was made in due course, and advertisements issued for creditors, and the creditors and the amounts of their debts duly found. By an order of the 21st of July, 1792, and a report of the 9th of August, 1792, made in pursuance

of the order, the funds then in court were apportioned amongst the creditors so found, but some of those who were entitled to apportioned parts never took their dividends out of court, and there remained unclaimed the sum of £425 10s. The funds then distributable were insufficient to pay the creditors in full.

In or not long previously to the year 1867 a sum of £3,146 16s. 3d., representing one-fourth of two shares in the Shadwell Waterworks Company, which had been then dissolved, was paid into court to the credit of a suit of *Sturt v. Hervey*, "the real estate of Charles Pitfield," and by an order, dated the 10th of July, 1867, made upon a petition, an inquiry was directed as to who was or were those beneficially interested in this fund, and in the sum of £425 10s., and the two funds were ordered to be invested, and advertisements were issued for the creditors of Charles Pitfield.

By the Chief Clerk's certificate, dated the 5th of April, 1875, it was in effect found that these funds were applicable to the *payment in full of the specialty debts of [244 Charles Pitfield, and an apportioned part of his simple contract debts, and that the only claim brought in was that of the present petitioners, who claimed, in respect of principal and interest, the sum of £2,788 5s. 8d., and that there was no claim made in respect of another creditor, whose debts amounted, together with interest, to £1,042 16s. 11d.

The petition asked that the funds in court might, after payment of costs, be applied in discharge of the petitioners' debt, and that any balance might be carried over to a separate account.

Glasse, Q.C., and *Murray*, for the petitioners: The rule has been established by *Wild v. Banning* (¹), that in the case of an assignment deed for the benefit of creditors any unclaimed dividends belong to those creditors who appear; and a long series of cases has decided, on the same principle, that in cases like the present, where a fund has become distributable after a long period, and only some of the parties who would have been entitled come in and claim, those who do come in are entitled to take the entire fund, or as much as may be necessary to pay their claims in full. In 1865, in *Re Cunningham's Trusts*, where a reversionary fund fell in and a petition was presented by one of several creditors who had previously proved against an estate, Lord Hatherley, then Vice-Chancellor Wood, directed, in the first instance, an inquiry as to who were entitled, and

(¹) Law Rep., 2 Eq., 577.

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afterwards made a final order distributing the fund exclusively amongst those who came and proved their claims.

The late Master of the Rolls followed the same practice in 1868, in *Horncastle v. Sewell*, and again, in 1871, in *Smith v. Smith*, and Vice-Chancellor Stuart took the same course in June, 1870, in *Hughes v. Lyon*. In *Bickley v. Penny*, where neither creditors nor specific legatees made any claim in answer to the advertisement, the Master of the Rolls, by an order of the 2d of March, 1866, distributed the fund amongst residuary legatees.

The practice of the court was uniform in these cases till a case of *Alderson v. Petrie* came before Lord Selborne, sitting for the Master of the Rolls, in June, 1873, and he held that all the creditors whose debts had been found had a [245] vested interest in their *proportion of any fund which subsequently became distributable, and that only the proportion of the fund which the debts of those who claimed payment at the subsequent period bore to the entire debts could be paid out, and the rest must be retained in court. But this isolated decision cannot be treated as upsetting a rule established by so long a series of authorities.

The rule is not newly established. It was acted upon in *Williamson v. Naylor* (1), and was the rule in Bankruptcy till altered by sect. 116 of the Bankruptcy Act, 1869.

J. Pearson, Q.C. (*Pemberton*, with him), for the official solicitor to the suitors' fund, commenced his argument, but was stopped by the court.

Higgins, Q.C., *Lovell* and *Udal*, who appeared for the representatives of Charles Pitfield, and raised some questions as to the mode in which the funds already distributed had been apportioned as between the principal and interest due upon the debts, were not heard.

MALINS, V.C.: I think I had better state the view I take of the case. The point raised on this petition is a very important one, and affects the practice of the court, because a great number of these claims of long standing are brought forward. In the present case very large funds have rather unexpectedly come into court, of which a considerable portion is found to belong to the estate of Charles Pitfield, who died as long ago as the year 1740. There was a suit for the administration of his estate. The usual advertisements for creditors were issued, and in 1792 it was found who were the creditors and what was the amount of their debts; and all the funds available were distributed, except a small sum of between £400 and £500, which was appor-

(1) 3 Y. & C. (Ex.), 208.

tioned but not taken out of court. That is how the case was dealt with in 1792, and probably if it had not been for the accretion to the estate by the sale of the Shadwell Waterworks that sum would have remained forever unnoticed, and would ultimately have gone towards paying *the national debt. But the fund representing two [246 shares in the Shadwell Waterworks having been paid into court, a petition was presented before me, and I made the usual reference to Chambers to ascertain who was entitled to the money. It has now been found that a considerable portion of the fund belongs to the estate of Charles Pitfield. His creditors have not been satisfied, and I suppose that if they had all now come forward it would have taken the whole fund to pay his debts. But it happens that, advertisements having been again issued, a proportion only, whom I will assume to be two out of twenty of the creditors, have come forward, and it is contended on their behalf that no creditor except those who have come forward is to be paid.

Undoubtedly it is the practice of the court that where advertisements for creditors are issued, those only who claim are treated as creditors, and if twenty claim, the whole estate is, if necessary, distributed amongst them; and if another person comes in after the distribution, he must obtain payment, if he can, from the creditors who have received the whole. In this case the creditors were found before 1792, and they were the *cestuis que trust* of the distributable funds, whatever they were or whatever they might become. It happens that the Shadwell Waterworks fund did not come in till about fifty or sixty years later, but when it did come in it was just as much applicable to pay the debts as if it had been originally part of the personal estate. It was, at any rate, subject to the same trusts for the payment of the creditors.

Authorities have been cited which show that it has been long the settled practice of the court, sanctioned by many eminent judges, including the Vice-Chancellor Wood, the Vice-Chancellor Stuart, and Lord Romilly, to distribute the fund exclusively amongst those who came in and claimed at the subsequent period. I confess that, when the case was opened last week, it did strike me as a reasonable course that those who claimed should be paid in full if there are funds enough to pay them, and that those who do not come should be considered as having abandoned their claim. But when I find that it does not appear that any case before *Alderson v. Petrie* was fully argued, and that

in the earlier cases the principle upon which they were decided appears to have been acquiesced in and assumed to 247] be settled; and that when *Alderson v. Petrie* came before Lord Selborne, sitting for the Master of the Rolls, it was fully argued and warmly contested, and that Lord Selborne came to the conclusion that the rule ought to be that those who came in and claimed at the subsequent period should only have such an amount as was a fair apportionment on their own debts, I think it more fitting, and more respectful on my part not to depart from that decision. I could not do so unless very clearly satisfied that the rule laid down ought not to be maintained; but, having heard only the argument in favor of the creditors who have come in, I am bound to say that my judgment concurs with that of Lord Selborne. Therefore I cannot decide otherwise than as he has done. The case will probably be appealed, and the Court of Appeal will settle the rule finally one way or the other. I follow that decision, that the creditors who have proved will only receive their ratable dividend on the amount of their debt.

Solicitors: *Ewbank & Partington; Meynell & Pemberton; Lovell, Son & Pitfield.*

[Law Reports, 1 Chancery Division, 257.]

V.C.B., July 22, 24; Nov. 9, 1875.

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*HAMILTON V. DALLAS.

[1874 H. 118.]

Domicil.—*Peer of England*—*Code Napoléon*, Art. 13—*Intestacy*—*Distinction between Domicil de facto and legal Domicil in France.*

A peer of the British Parliament is not, by reason of his obligation to attend the House of Peers whenever his presence there is required, incapacitated from acquiring a domicile of choice in a foreign country.

A *de facto* domicile governing the succession to personal property of which he dies intestate may be acquired in France by a foreigner who has not obtained the government authorization imposed by the *Code Napoléon*, Art. 13, as the condition for enjoyment by a foreigner resident in that country of full civil rights.

ADJOURNED SUMMONS raising the question of the domicile of the late Lord Howden at the time of his death in 1873.

Lord Howden, a deputy-lieutenant of the county of York, G.C.B., and lieutenant-general in the army, was born in England, and retained these titles until his death. In 1850 he went to Madrid as Her Majesty's envoy extraordinary to the court of Spain.

In the same year he sold his house and property at Grimston Park in Yorkshire, and all his real estate in England.

A portion of his fortune was invested in securities in England, and until the time of his death he kept a current account with a London banker.

In 1857, on his recall from Madrid, he took up his residence definitely in France, and bought an estate near Bayonne, where he built himself a house called the Casa or Château Caradoc, in which (except during the siege of Paris, when he was shut up in the city) he lived until his death in 1873.

During June and July, 1859, he was in England on a visit, on which occasion he attended for the last time in the House of Lords.

In October, 1861, he retired from the army by the sale of his commission, but, according to the War Office regulations, his name was retained in italics in the army list upon his notifying (which was done until his death) the fact of his being alive twice a year.

Early in 1863 he paid a short visit to an old friend, Mr. G. R. *Smith, in Scotland, after which he was never [258 again in Great Britain.

Upon this occasion his relative, Sir Hamilton Dallas, hearing of his being in England, wrote to invite him to come and stay with him. In answer to this invitation, which did not reach him until after he had left England, Lord Howden replied from Paris, in a letter dated the 12th of February, 1863, as follows :

"I regret that circumstances prevent my accepting it (the invitation), not so much from its material convenience, which is very attractive, as from the opportunity it would have given me of seeing you and profiting by your neighborhood. I have no intention whatever of going to England, and I do not see any probability of my ever crossing that riotous rivulet again. As you say, I am little interested in English politics, but I am still much less so in all things appertaining to what you call 'court circles.' I have been displaced from the first, and never had any real relationship with the second. We have both seen a great deal of warm suns in our life; perhaps your affection for the brilliant deity is not so great as mine. I confess that I seek him with unlimited devotion, and I am appalled by both the moral and physical gloom of England. I trust that your health keeps good. I see that you write from the country, and I therefore presume you like its exercise. I hope you will not completely adopt the English system, which has always appeared to me an oscillation between undue fatigue and undue tonic."

In 1871 an action was commenced both at Bayonne and also in the Court of Queen's Bench against Lord Howden by one Albano, an architect, who had been employed upon the building of the villa near Bayonne.

In April, 1872, Messrs. Freshfields, who acted as his Lordship's solicitors in England, received from him the following letter :

“*Château Caradoc, Bayonne, France.*

“*2d April, 1872.*

“When, a short time ago, I transmitted to you the original writ for the tribunal of Bayonne served on me by Mr. Benedict Albano, I omitted to mention that I immediately accepted the jurisdiction of the French tribunal on 259] account of my being *bona fide* domiciled, and have been so for twenty years, in this country, ‘*sine animo revertendi*,’ and that I have no domicile in England or any other country excepting the one from which I now write.”

In an affidavit sworn by him in this action Lord Howden stated :

“In or about the year 1850 I left England, and in or about 1857 I came to reside in France, where I have resided for the last fifteen years. I have no intention of returning to England for the purpose of permanently stopping there, nor have I any dwelling-house, estate, or other real property in any country save and except in France.”

Lord Howden never acquired the authorization of the French Government for the establishment of his domicile in France. He died at the Château Caradoc on the 9th of October, 1873, having on the 8th of June, 1860, made a will, written in his own hand in English, thereby confirming in all its contents his will made at Paris on the 17th of November, 1858 (relating to his property in France only).

By the will of June, 1860, which related to property in England only, Lord Howden directed the residue of his property remaining in England after payment of debts and legacies, &c., to be divided into four portions, one of which was given to Charles Cradock, since deceased.

The share of Charles Cradock having lapsed by his death in Lord Howden's lifetime, there was an intestacy as to this one-fourth of the residue ; and a suit having been instituted for the administration of Lord Howden's estate, it became necessary, for the purpose of determining the succession of this one-fourth of the residue of which there had been an intestacy, to settle whether Lord Howden's domicile was at the time of his death French (in which case the personalty

would be divisible into two portions, one going to the next of kin on the paternal, the other to the next of kin on the maternal side), or English (in which case Lady Rose Meade, as his sole next of kin according to the Statute of Distributions, would be alone entitled).

This question having been raised by adjourned summons was now adjourned into court.

**Kay, Q.C., and Yate Lee*, for Sir R. Hamilton, in [260 support of a French domicile: It is established by the evidence that Lord Howden deliberately took up his residence in France in 1857 *sine animo revertendi*, and made it his permanent home, and remained there until his death, so as *animo et facto* to effect a change of domicile and to acquire a French domicile of choice; *Udny v. Udny* (1); *Forbes v. Forbes* (2); and accordingly the right of succession to the personal property in respect of which he died intestate must be governed by the law of the country in which he was domiciled at his death.

It will be contended that, having regard to the Code Napoléon, Art. 13 (3), a foreigner cannot become domiciled in France, even for the purposes of succession to his personal property, without authorization by the government.

But that article is dealing with municipal (*droits civils*) as distinguished from international rights. It does not regulate, and has nothing to do with, the succession to an intestate's personal estate, and, indeed, it could not affect the paramount rule *mobilia sequuntur personam*, derived from the *jus gentium*, by which questions of domicile are regulated. Moreover, Art. 13 is an enabling statute, conferring important privileges on those who take advantage of it, and cannot by any legitimate principles of interpretation be considered as imposing by implication a restriction on foreigners to which they were not subject before the promulgation of the Code: *Cole on Domicil of Englishmen in France* (4). For the enjoyment by a stranger of full civil rights, while he continues to reside in France, certain formalities have to be gone through, and he must obtain the authorization of the government admitting him to establish his domicile there. But for the purpose of determining questions of testacy or intestacy, and the right of succession to his movable property, it is sufficient, without the authorization of the French Government, that the stranger by the effect of a fixed

(1) *Law Rep.*, 1 H. L., Sc., 441.

(2) *Kay*, 341.

(3) Code Napoléon, Art. 13: "L'étranger qui aura été admis par l'autorisation

de l'Empereur à établir son domicile en France y jouira de tous les droits civils, tant qu'il continuera d'y résider."

(4) Pages 22, 30, 75.

residence, combined with the intention of residing, shall 261] *have become *de facto* domiciled in France: *Bremer v. Freeman* (*). The droit civil has nothing to do with the case. Lord Howden did not want any civil rights, and did not ask for any. We shall be told that according to recent decisions of the French courts a domicile *de facto* acquired in France *sine animo revertendi*, cannot supply the authorization required by Article 13: see *Sussman's Case* (*); *Olivarez' Case* (*). But these decisions in the Court of Cassation amount at the highest to the construction placed by the French courts upon the French Code and the Law of the 14th of July, 1819, which, repealing Arts. 726 and 912 of the Code as to the disqualification of foreigners to succession, declares that foreigners shall be entitled to succeed and to dispose and to receive in the same way as French subjects throughout the realm: *Lois Usuelles* (Roger et Sorel) V° Aubaine.

Even if it were necessary to resort to the construction put by the French courts upon Art. 13 of the Code, it is established by recent decisions in the Cour de Cassation: *Lethbridge's Case* (*); *Speck's Case* (*), that the authorization of the government is not a condition precedent to establishing a domicile in France, but ensures to a foreigner the consequences of such establishment, so far as regards the exercise of all civil rights; and, further, that a foreigner who resides habitually in France without having obtained the previous authorization of the government can have a *de facto* domicile in that country involving consequences which are certain (e.g., the regulation of his succession) though less extensive than those which are conferred by Art. 13. This view, which is that ultimately adopted by Merlin, Répertoire de Jurisprudence, 5^{me} ed. (1827), tome 5^{me} Domicile, in correction of the opinion expressed in his earlier editions (see Cole, Domicil, 26), is strengthened by the Law 23-25, April, 1871. "4. Sont assujettis aux droits de mutation par décès les fonds publics, actions, obligations, parts d'intérêts, créances et généralement toutes les valeurs mobilières étrangères, de quelque nature qu'elles soient, dépendant *de la succession d'un étranger domicilié en France avec ou sans autorisation." Dalloz, Recueil Périodique, 1871 (*), and as stated in the opinions of MM. Betolaud, de Coussergues,

(*) 10 Moo. P. C., 306.

(*) Dalloz, Rec. Pér. 1874, Part i.,

(*) Dalloz, Rec. Pér. 1872, Part. ii., p. 465.

p. 65.

(*) Dalloz, Rec. Pér. 1872, Part ii.,

(*) Phillim. Inter. Law, vol. iv., p. 231. p. 255.

(*) Part iv., p. 62.

Senard, and Desmarests, the advocates to whom the question has been submitted, it seems no longer possible in the presence of such a formal legislative text, to contend that a foreigner cannot be domiciled in France without authority from the government.

Jackson; Q.C., and *Onslow*, for the plaintiff, also supported the above contention, and referred to *Thomson v. Advocate-General* ⁽¹⁾ as showing that no legacy duty would be payable upon Lord Howden's personal property in the event of his domicil at the time of his death being declared to have been French. They also cited *Douglas v. Webster* ⁽²⁾; *Onslow's Case* ⁽³⁾; *Bremer v. Freeman* ⁽⁴⁾.

Hinde Palmer, Q.C., and *Nalder*, for Lady Rose Meade, Lord Howden's sole next of kin according to the English mode of distribution, and

W. W. Karlake, for the Commissioners of Inland Revenue: Lord Howden's domicil at the time of his death remained English, and the succession to the property of which he died intestate must consequently be regulated by English law.

1. His domicil of origin being English, Lord Howden had no power as a peer of Parliament to divest himself of his English and acquire a foreign domicil, and thus get rid of the duties imposed by his position. Peers are created for two reasons: 1. *ad consulendum*; 2. *ad defendendum regem*; "on which account the law gives them certain great and high privileges, such as freedom from arrest, even when no Parliament is sitting; because it intends that they are always assisting the sovereign with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valor": *Stephen's Commentaries* ⁽⁵⁾; *Bracton* ⁽⁶⁾. *These high privileges and position are not [263] personal, but held upon the condition of discharging the functions appertaining to their office. Of these the principal one is attendance in Parliament, from which they may not absent themselves without special dispensation (which dispensation is contrary to law: *Coke*, 4th Inst. ⁽⁷⁾; *Cruise's Dignities* ⁽⁸⁾), on pain of being amerced or otherwise punished: 5 Ric. 2, c. 4; 6 Hen. 8, c. 16; it being a high offence for any subject to deny the king that assistance for the good of the public, either in his councils or wars, which by law he is bound to give him; as for a peer not to come to the

(1) 12 Cl. & F., 1.

(2) Law Rep., 12 Eq., 617.

(3) Phillim. Inter. Law, vol. iv., p. 227.

(4) 10 Moo. P. C., 306.

(5) Vol. ii., book iv., ch. 5.

(6) Lib. i., c. 8, p. 82; Co. Litt., 110.

(7) Page 49.

(8) Page 80.

Parliament at the day of summons, or to depart from thence without the king's license: Hawkins' Pleas of the Crown (').

Accordingly, in the time of the Powder Plot, Lords Mordaunt and Stourton were fined in the Star Chamber 10,000 marks and 6,000 marks for not attending the first day of Parliament, and remanded to the Tower during the will of the king: Viner's Abridgement, "Peer" (B); Coke, 4th Inst. ('). These doctrines, though they smack of antiquity, have not fallen into desuetude, for it is still usual on occasions of urgent business to order the House of Lords to be called over, and to enforce the order upon absent lords by fine and imprisonment, two modern instances being the illness of King George III., the 1st of November, 1810, and the bill for degradation of Queen Caroline, 1820: May's Parliamentary Practice ('). Being under this positive obligation to attend in their place in Parliament to advise their sovereign on all occasions when required, their position is like that of an officer in the army, to whom, from his obligation to return to active service if ordered, it is not competent to acquire a domicile in a foreign country: *Hodgson v. De Bearuchesne* ('). Not being in a position to abandon his English domicile of origin, the intention, even if to a certain extent complete by the fact of his having gone to France *animo manendi*, would not be sufficient to change the domicile: *Craigie v. Lewin* ('). Residence and domicile are two perfectly distinct things; and if there was, as in this 264] case, any *obstacle to getting rid of the English and acquiring a foreign domicile, the domicile of origin will not be lost by the mere abandonment of an English residence: *Bell v. Kennedy* (').

2. Even assuming that Lord Howden was not incapacitated by his peerage from acquiring a foreign domicile, the *animus* with which he took up his residence in France, though coupled with the *factum* of long-continued residence there, is not enough to make his domicile French, for the purposes of succession or testamentary disposition, *Collier v. Rivaz* ('), unless as is provided by the Code, Art. 13, the authorization of the government has been obtained. *Bremer v. Freeman* (') has been relied on in support of the contention that, although the authorization of the French Government under Art. 13 has not been obtained, a domicile regulating all questions of testacy and intestacy may be ac-

(1) Vol. i., p. 65.

(2) Page 44.

(3) Page 212.

(4) 12 Moo. P. C., 285, 316.

(5) 3 Curt. Eccl., 435, 445.

(6) Law Rep., 1 H. L., Sc., 307, 320.

(7) 2 Curt. Eccl., 855.

(8) 10 Moo. P. C., 306.

quired in France. But this decision of the Privy Council was opposed to the decisive opinion given by ten advocates of the highest reputation in France, named by the President of the Civil Tribunal of the Seine (including MM. Berryer, Dupin, Marie, O. Barrot, Chaix d'Est Ange), that in that case the testatrix, not having obtained from the French Government the authorization to establish her domicile in France in the terms of Art. 13, had never acquired in France a domicile capable of regulating her will or the form of her will by the law of that country: see Phillimore's International Law (*). Moreover, it was received with such alarm that it gave rise to the act 24 & 25 Vict. c. 114, which enacts that without regard to domicile every will made by a British subject shall, as regards personal estate, be valid if made according to the forms required by the law of the place where it was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin. As was observed by Lord Lyndhurst in the debate on that bill (Hansard's Parliamentary Debates (**)), that decision "had tended very considerably—at least so far as residents in France were concerned—to increase the doubt and difficulty *in which the subject was involved," and had [265 not met with general approval: Sugden's Real Property Stat. (*). Mere domicile *de facto* in a foreign country is not sufficient to Regulate the right of succession, even by the law of nations (Merlin, Rép. de Jurisp. V° Domicile, § 13), and certainly is not sufficient by the municipal law of France. The most recent decision in the Civil Chamber of the Cour de Cassation, *Forgo's Case* (May 4, 1875), decides that domicile *de facto* without authorization from government is not sufficient to confer a legal domicile with the judicial effects therewith connected. *Melizet's Case* (Jan. 12, 1869) (*), *Sussman's Case* (*), *Spech's Case* (*), are also distinct authorities that without the prescribed authorization a stranger, though he may have fixed his residence in France and dwelt there *sine animo revertendi*, cannot acquire either the enjoyments of civil rights or a domicile in France. To the same effect is *Lynch's Case* (March 13, 1850) (*), where the French Court refused to entertain the settlement of the succession of the deceased on the ground

(*) Vol. iv., p. 235.

(*) Vol. cxii., p. 1638.

(*) Page 408.

(*) Dalloz, Rec. Pér. 1869, Part i., 294.

(*) Dalloz, Rec. Pér. 1872, Part ii., 65.

(*) Dalloz, Rec. Pér. 1872, Part ii., 235.

(*) Sirey's Rep. (1851).

that, not having been naturalized a Frenchman, and not having even obtained authorization to establish his domicile in France, he died an Englishman, and his fortune, being wholly personalty, must be governed by the law of England. *Thornton v. Curling* (Cour de Cassation, 1826) decides conversely, that as Thornton, an Englishman, had obtained the authorization of government to establish his domicile in France, his succession and the validity of his will were subject to the law of France: *Phillimore's International Law* (*). The advocates who have been consulted on our behalf—MM. Carel, Demolombe, Moreau—concur in holding that Lord Howden could not acquire in France a legal domicile capable of affecting the transmission by way of succession of his movable property without the authorization of the government, and that as he retained his English nativity, his political prerogatives and titles, his personal *status* remained English, and his movable property on his death became transmissible to his English next of kin according to the rules of the law of England.

266] *[They also referred to the *Code Napoléon* (*); *Troplong, le Code Expliqué* (*); *Pardessus, Cours de Droit Comm.* (*); *Duranton, Cours de Droit Français* (*); *Pothier* (*); *Pigeau, La Procédure Civile* (*).]

Eddis, Q.C., and *Kekewich*, for the executors of the English will.

Kay, in reply: Upon the first point, there is no analogy between the case of an officer in Her Majesty's army, who is bound, on pain of losing his commission, to return to active service when called upon, and that of a peer who might render himself liable to a pecuniary fine, but could by no possibility be deprived of his peerage or any of the privileges attaching to his rank for absence beyond the seas and non-attendance in Parliament. The cases of *Hodgson v. De Beauchesne* (*), and *Craigie v. Lewin* (*), have, therefore, no application. It may be that a peer cannot change his political *status*, or, putting off his allegiance, become a naturalized Frenchman. But the question of naturalization and allegiance is perfectly distinct from that of domicile: *Udny v. Udny* (*), and there is no authority for holding that a peer cannot change his residence, and of his own choice acquire a domicile in a foreign county which will regulate the succession to his personal estate: *Bempde v.*

(1) Vol. iv., p. 223 *et seq.*

(2) Art. 102, 107, 110.

(3) Vol. xviii., p. 378.

(4) Page 773.

(5) Liv. i., tit. iii., 353.

(6) Vol. vi., p. 67, 68.

(7) Vol. i., p. 57.

(8) 12 Moo. P. C., 285.

(9) 3 Curt. Eccl., 435.

(10) Law Rep., 1 H. L., Sc., 441.

Johnstone (1); *Somerville v. Somerville* (2); *Heath v. Samson* (3). Art. 13 of the Code refers entirely to the enjoyment of civil rights—those personal privileges given to a French citizen of which a foreigner settled in France may wish to avail himself. But the enjoyment of civil rights during life, a question of municipal law, has nothing whatever to do with the succession to a man's property after his death, which is regulated by his domicile, a branch of international law depending on rules common to the jurisprudence of all civilized nations, and, as we submit, unaffected by the decisions of the French courts upon provisions *of their own municipal law. *Collier v. Rivaz* (4) has [267 been distinctly overruled by *Bremer v. Freeman* (5); and it is now settled, in accordance with the law of nations, that domicile *de facto* in a foreign country is enough to attract the law of succession prevailing in the country of the *de facto* domicile; and, in conclusion, we say that Lord Howden was not incapacitated by his peerage from abandoning his English domicile of origin and acquiring a domicile in France; and that, having *de facto* acquired a domicile in France, the succession to the personal property of which he died intestate must be regulated by the law of that country, although he never obtained the authorization to establish his domicile in that country required for the enjoyment of full civil rights by the Code Napoléon, Art. 13.

BACON, V.C.: The first question is as to Lord Howden's domicile. It is asserted, not only that he did not acquire, but that he was not competent to acquire, a domicile in France. For the purpose of establishing that proposition, his condition as a peer of Parliament is referred to, and the argument is strengthened by reference to cases in which military officers, it was said, were not capable of acquiring a domicile in a foreign country by reason of the obedience which they were bound to pay to the military regulations that existed in their own country. Upon the first point—that is, the incapacity of a peer to acquire a domicile, because of his duty to advise the Queen whenever she calls for his advice, or to attend the House of Peers whenever his attendance there is required—I should be very sorry, without some plain authority, at this time of day, for the first time to decide that any such law does now prevail, or that it ever did prevail. That a peer is under certain social municipal obligations, of course need not be said. If he

(1) 3 Ves., 198.

(2) 5 Ves., 750.

(3) 14 Beav., 441.

(4) 2 Curt. Eccl., 855.

(5) 10 Moo. P. C., 306.

neglects them, he may incur censure, perhaps punishment, but that is the extreme liability which he incurs. If he is liable to pay a fine, he must pay it; but how does that affect the question whether he can do that which every other man can do, namely, change the place of his residence, and fix 268] for the whole of his *life his residence in another country? As to the authorities which have been referred to, in my opinion neither the Star Chamber, nor the old books referred to by Blackstone, nor any other authority that I have heard of, are sufficient to maintain a proposition which would be startling, if it were carried to its full extent, and prevent a peer from going, no matter for how short a residence, abroad, and taking up his residence at a bathing place, or anywhere else that he thought fit—that it would be positively against his duty is, I think, saying too much, and for the present it is enough to say that, in the absence of any kind of authority upon that subject, I decline to adopt what seems to me to be so imaginative a proposition. The case of the soldier is in itself entirely different. By the regulations of the military discipline in this country, of course a soldier is always bound to obey commands. A soldier in the service of the East India Company who, in the discharge of his military duties, finds it necessary to acquire a residence, gets by that fact, as the case referred to (*Hodgson v. De Beauchesne* ⁽¹⁾) recognizes, what has been called an Anglo-Indian domicile, and the different decisions establish that he had there his domicile. Then he changes that. Under what circumstances? He gets permission, which is called a furlough, to come for a time and visit Europe. He does so; he lives at various places, but there is not the slightest indication of his intention either of giving up his military rank, or parting with any property that he had acquired in his place of domicile. Either in France or in Scotland he sojourns for as long a time as suited him, but upon no single occasion is it suggested that he ever expressed an intention of not returning to India. He was bound to do one of two things: either to return to India if he was called upon to do so, or to resign his commission. There is no evidence in either of the cases which have been referred to that any such intention existed. It is mere commonplace, and hardly necessary to repeat that upon a question of domicile the test must always be the *animus* and the *factum*. The intention with which a man changes his residence is easily ascertained. The circumstances under which he resides in a foreign country are easily ascer-

(¹) 12 Moo. P. C., 285.

tained as matters of fact; and the matters of fact, as far as *Lord Howden is concerned, are, in my opinion, most [269 clear and conclusive. Possessed of large estates, as it seems, in England, he sold them all soon after or about the time that he went abroad in a diplomatic character. He retained none of his property in England, and it is not suggested that he ever had a residence of any sort, or any place that he could have inhabited in this country, belonging to him. He went first and performed his diplomatic services in Spain, and then settled himself in France, near Bayonne, where he built a house in which he established himself, and there and in Paris he passed the rest of his life, visiting England only upon one occasion, which has been mentioned, and which brought from him that letter which is referred to in Sir Robert Hamilton's affidavit. Nothing can be plainer than the expressions in that letter. If the *animus* is to be looked for, where can you find it better than in the expressions in the letter which has been referred to, and in the man's own conduct. He states in the plainest terms possible, and even gives his reason for the determination he has come to, that he never means to visit England again; that he is dissatisfied with England, and not pleased with the prospect of crossing the "riotous rivulet" again. Could a jury, or any other tribunal to whom those facts were submitted, hesitate for a moment to say that Lord Howden had established himself in France, and that he had done so without the intention of ever returning to England? It does not rest upon that alone, because there is his affidavit, which had been made upon the occasion of the action brought against him by Albano, in which he explains his residence in France, and expresses his determination not to return to England. He expresses the same intention in the letter to Mr. Freshfield, which is mentioned in Mr. Freshfield's affidavit. So that, upon this collection of facts, there cannot be a particle of doubt that Lord Howden, as far as he was concerned, had positively and peremptorily made up his mind to renounce his residence in this country, and to take up his abode in France, and there to live. That determination seems to have undergone no change during all the days of his life. If, then, it was competent for him, as, in my opinion, it was abundantly competent for him, or any other free man, peer or peasant, to change his residence from the place of his origin, and to take up a domicil in a foreign *country, Lord Howden had *de facto cum* [270 *animo* done that beyond all possibility of doubt or question.

That is the first point which has been elaborately, and very ably and satisfactorily, argued before me.

Then it was suggested that by the French law it was not competent for Lord Howden to acquire a domicile. The 13th section of the Code Napoléon, which has been referred to for that purpose, in my opinion, bears no such construction as is sought to be put upon it. It cannot be said that he could not acquire the right to reside in France.

His Lordship, after referring to Art. 13, proceeded: In the first place, I ask myself—there being no questions of testacy as in *Bremer v. Freeman* (*)—has he asserted any right? He has asserted no right that I know of, except the right of residing, and that he has a right to reside by the law of nations, by the law of France, and by every law of reason and good sense, is not to be disputed; but a right to succeed to the property of which he has died intestate is not comprehended in or covered by the 13th Article. On the contrary, turning to that chapter of the Code which treats of the domicile, Art. 102 provides that the domicile of every Frenchman as to the exercise of his civil rights is in the place in which he has his principal establishment. Then it speaks of the change of domicile, and so on, and it speaks of other persons than Frenchmen, saying that a married woman has no other domicile than that of her husband, a minor not emancipated shall live with his father or mother, or his tutor, who may be a foreigner—the minor may be a foreigner—and minors who serve or travel habitually with another person shall have the same domicile as the person they serve, with whom they work, and as long as they remain in the same house, so that the fact that a foreigner can acquire a domicile *de facto* in France is not for a moment to be called in question. It requires no provision in the Code for that; it is a law paramount to the law of the Code, not provided against nor provided for in the Code, but a natural and national right against which there is no interdiction or prohibition. Now that this must be the law will be found on referring to Cole on Domicil (*), in which the matter is 271] treated, and by the *authorities to which he refers there; and without adopting Mr. Cole's conclusion, which I have no right to do—that is, to treat it as an authority, whatever respect I may feel for it—the passage in Merlin upon this subject of domicile, is, in my opinion, quite conclusive upon the question now before me. He says:

“Disons donc que l'étranger qui, sans la permission du Gouvernement, établit son domicile en France, se soumet

(*) 10 Moo. P. C., 306.

(*) Page 24 *et seq.*

par cela seul à la juridiction des Tribunaux Français, comme il acquiert par cela le droit de se marier, dans le lieu qu'il choisit pour sa résidence habituelle; comme il détermine par cela seul la compétence du juge qui, après son décès, devra connaître de la succession qu'il laissera en France."

So that if I am to take that as an exposition of the law, without referring to particular cases, it is plainly announced as being the law that a foreigner who, without any authority of the government, shall establish his domicile, becomes entitled to enjoy certain civil rights; and, more than that, he submits to the authority of the judge of the place which he shall inhabit, and that judge shall have jurisdiction over the question of the succession to his property. That this is plainly the law is not disputed in any of the cases that have been referred to. It may be observed that it is not entirely lost sight of in *Udny v. Udny* ('), that very valuable case which has been so often referred to, where Lord Westbury expresses himself, after distinguishing between the political and the civil *status*, which has been gone into at length, and I need not therefore refer to it further than to quote this passage: "The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend." The cases which have been referred to are not, any one of them, in the slightest degree at variance with that. *Forgo's Case* must be considered to be at present not in the shape of a binding authority as it is still subject to appeal. That Forgo was a resident in France is beyond all doubt, and that Forgo died intestate is *likewise clear. The question was who [272 was to succeed to his property? The government said we succeed, because he had not the authority of the government to live in France; it must have gone as far as that. That is, however, discountenanced by the Court of Cassation, and it is 'discountenanced by and inconsistent with every other authority that has been referred to. *Spech's Case* (") is a direct authority against it. In *Spech's Case*, if the want of authorization by the government to a man's residence in France, and to making his holograph will in France, would have been enough, the Spanish consul was right in insisting upon the administration of his goods. It was plain,

(') Law Rep., 1 H. L. Sc., 441, 457.

(*) Dalloz, Rec. Per., 1872, Part II., 235.

from the decision of the Court of Cassation, that the Spanish consul was not right—that he had no right whatever to interfere in the administration of his goods, although the testator in that case (the will not being in question as far as the case goes that I know of) not having any authority from the French Government, yet enjoyed civil rights to the day of his death, and the persons who claimed the succession were not impeded in the slightest degree by the restrictions of the 13th Article. Another clause referred to was Art. 110, which provides that the place where the succession shall open shall be determined by the domicile. *Spech's Case* and *Sussman's Case* (') established, as I take it, clearly this, that upon the intestacy of a foreigner, who has not obtained the authority of the government, the succession shall open in the place where he had established his domicile, and shall be determined by the local judge in the first instance, and (subject, of course, to any appeal that might be brought before a higher authority) that where the succession opens there it shall be determined, and there the persons who, according to French law, are entitled to claim his property, may come and have their rights determined. As far as *Forgo's Case* goes, the notion that the government can lay hands upon all the property and consider it theirs, for want of the formalities of the 13th clause being complied with, is wholly discountenanced. Under these circumstances, I entertain no doubt whatever upon the question which has been argued. I have no doubt of Lord Howden's competency to acquire a French domicile. I have no doubt of the fact that 273] he did acquire that domicile beyond all *possibility of question. I have no doubt that the 13th Article, which speaks of the enjoyment by him or any other foreigner of droits civils, neither in its terms nor in its sense and spirit, has anything to do with the rights of the person who comes to claim his property at a time when he and all droits civils to be exercised by him are extinguished and gone. That disposes also of the Attorney-General's objection. I am not sorry to have had an opportunity of hearing Mr. Karslake's argument upon the subject, but I have not the slightest doubt of the well-settled law, that no legacy duty whatever is payable in respect of this intestacy, because of what I have said before as to the domicile.

Solicitors: *Bell, Stewards & Co.*; *Bevan & Daniell*; *Freshfields & Williams*; Solicitor for Commissioners of Inland Revenue.

(') Dalloz, Rec. Per., 1872, Part ii., 65.

See 3 Am. Law Reg., N.S., 257; note to Attorney-Gen'l v. Countess De Wahlstatt, 3 Hurl. & Colt., 391, Johnson & Co.'s Am. ed.

There must be both the fact of abode and the intention of remaining indefinitely, to constitute a domicile: Hegeman v. Fox, 31 Barb., 475; Jopp v. Wood, 4 De Gex, Jones & Smith, 616 and note, Mr. Perkins's ed.; Ripley v. Hebron, 60 Maine, 379; Parsons v. Bangor, 61 Maine, 457; Lord v. Colvin, 4 Drewry, 366, 376; Graham v. Public Adm'r, 4 Bradf. Surr. Rep., 127; Crawford v. Wilson, 4 Barb., 504; Carter v. Sommermeyer, 27 Wisc., 665.

Both must therefore be proved. The first is readily proved as a single fact; the other may be established by declarations of the party, or by his conduct: Hegeman v. Fox, 31 Barb., 475.

Change of residence alone, however long continued, does not affect a change of domicile; there must be an intention to change the domicile: Morehouse v. Lord, 10 H. L. Cas., 272; Dupuy v. Seymour, 64 Barb., 156; Jopp v. Wood, 4 De Gex, Jones & Sm., 616; Visscher v. Visscher, 12 Barb., 640; Liscomb v. New Jersey, etc., 6 Lans., 75.

Though a change of domicile requires no certain length of time; a *bona fide* and permanent change is sufficient: Visscher v. Visscher, 12 Barb., 640; Parsons v. Bangor, 61 Maine, 457.

As to what circumstances are sufficient to show that a party has acquired an actual residence with the intention of remaining an unlimited or indefinite time, see Hegeman v. Fox, 31 Barb., 475; Gilman v. Gilman, 52 Maine, 165; Jopp v. Wood, 4 De Gex, Jones & Smith, 624 and note, Mr. Perkins's ed.; Atchison v. Dixon, L. R., 10 Eq., 589; Ames & Duryea, 6 Lans., 155; Ripley v. Hebron, 60 Maine, 379; Parsons v. Bangor, 61 Maine, 457.

As to what do not, see White v. Brown, 1 Wall. Jr., 217; Douglas v. Douglas, L. R., 12 Eq., 617; Jopp v. Wood, 4 De Gex, Jones & Smith, 616; Visscher v. Visscher, 12 Barb., 640; Liscomb v. New Jersey, etc., 6 Lans., 75; Lord v. Colvin, 4 Drewry, 366.

A domicile once acquired continues till a new one is gained. While in transit the old domicile remains: Littlefield v. Inhabitants of Brooks, 2 Am. Law Reg., N.S., 735, 738-740 note,

50 Maine, 475; Parsons v. Bangor, 61 Maine, 457; Gilman v. Gilman, 52 Maine, 165; Monson v. Fairfield, 55 Maine, 117; White v. Brown, 1 Wall. Jr., 217; Bell v. Kennedy, L. R., 1 Scotch and Div. App., 307; Undy v. Undy, L. R., 1 Scotch and Div. App., 441; Douglas v. Douglas, L. R., 12 Eq., 617; Jopp v. Wood, 4 De Gex, Jones & Smith, 616 and note, Mr. Perkins's ed.; Atty. Gen. v. Countess De Wahlstatt, 3 Hurl. & Colt., 374; Lord v. Colvin, 4 Drewry, 366; Pfontz v. Comford, 36 Penn. St. R., 420; Graham v. Public Adm'r, 4 Bradf. Surr. R., 127; Crawford v. Wilson, 4 Barb., 504; Tibbitts v. Townsend, 15 Abb., 221; Dupuy v. Seymour, 64 Barb., 156; Liscomb v. New Jersey, etc., 6 Lans., 75; Mears v. Sinclair, 1 West Va., 185.

But see Hicks v. Skinner, 71 N. C., 1.

When a domicile of choice is abandoned, the domicile of origin revives. The abandonment of an acquired domicile *ipso facto* restores the domicile of origin. If the domicile of choice be abandoned the domicile of origin comes instantly into action and continues until a second domicile of choice has been acquired: Undy v. Undy, L. R., 1 Scotch and Div. App., 441.

As to how far a parent may change the domicile of an infant, see Mears v. Sinclair, 1 West Va., 185; Walcot v. Botfield, Kay's Chy., 534.

As to the difference between domicile and allegiance, see Undy v. Undy, L. R., 1 Scotch and Div. App., 441; Douglas v. Douglas, L. R., 12 Eq., 617.

The meaning of the word "residence" is different from that of "domicil." Residence imports personal presence. A person may be said to have more than one residence at the same time: Walcot v. Botfield, Kay's Chy., 534; Pond v. Hudson River, etc., 17 How. Pr., 543; Haggart v. Morgan, 5 N. Y., 422; Matter of Wrigley, 4 Wend., 602, note (2d ed.)

As to the difference between "residence" and "domicil," see Walcot v. Botfield, Kay's Chy., 534.

One whose family resides permanently within the jurisdiction, but is himself obliged to be frequently absent in the course of his employment as a seafaring man; is a resident: Duff v. Hore, Irish L. R., 6 Com. Law, 508.

Many intricate cases as to who are residents under statutes relative to taxation, attachments, etc., have arisen, but as each case must be determined upon its own facts it would be difficult to lay down general rules.

As to attachments, etc., against non-resident debtors; as to who are not, see *Greaton v. Morgan*, 8 Abb. Pr. Rep., 64; *Chaine v. Wilson*, Id., 78, 16 How., 552; *Haggart v. Morgan*, 5 N. Y., 422; *Matter of Fitzgerald*, 2 Caines, 318; *Lee v. Stanley*, 9 How. Pr., 273; *Murphy v. Baldwin*, 41 How., 270; *Bache v. Tuthill*, 17 How., 554; *Frost v. Brisbin*, 19 Wend., 11; *Matter of Wrigley*, 4 Wend., 602, 8 Wend., 602.

As to who are, see *Hurlburt v. Seeley*, 11 How. Pr., 507; 2 Abb. Pr., 138; *Turner v. Church*, 2 Abb. Pr., 299; *Pfontz v. Comford*, 36 Penn. St. R., 420; *Matter of Crawford*, 3 N. Y. Leg. Obs., 76; *Tibbitts v. Townsend*, 15 Abb., 221.

As to voting: *Fry's Case*, 71 Penn. St. R., 302; *Crawford v. Wilson*, 4 Barb., 504.

As to being entitled to hold office: *Com. v. Kelleher*, 115 Mass., 103.

As to taxation; *Hilt v. Crosby*, 26 How., 413; *Otis v. Boston*, 12 Cush., 44.

As to the place where a chattel mortgage should be filed: *Mellish v. Van Norman*, 13 Upper Can. Q. B., 451.

"Resident" and "inhabitant" have been said to be tantamount to each other: *Rosevelt v. Kellogg*, 20 Johns., 208.

But see *Frost v. Brisbin*, 19 Wend., 13; *Matter of Wrigley*, 4 Wend., 602 note.

One who has no legal residence anywhere is not a non-resident: *Barnes v. Harris*, 4 N. Y., 374.

Nor is he, it seems, an absconding debtor: *Matter of Fitzgerald*, 2 Caines, 318.

Voluntary transfers of *personal* property, wherever in point of fact the *situs* of the property itself may be, are controlled and regulated by the law of the owner's domicile, and if valid there to transfer the title, are valid everywhere else: *Ackerman v. Cross*, 40 Barb., 465.

Accordingly held that an assignment executed in Canada, where all the parties resided at the time of its execu-

tion, and which was valid and effectual by the law of that country, operated to convey property in the state of New York, as against an attachment valid in form and requirements in favor of a creditor of the assignor and a citizen of that state, although the assignment was not acknowledged, filed or recorded in New York, nor in other respects in conformity with the statute of that state: *Ackerman v. Cross*, 40 Barb., 465.

As to whether a non-resident plaintiff may, in New York, attach the property of a non-resident debtor, see 14 Eng. Rep., 441 note; *Matter of Maltz*, 2 Barb., 436; *Downs v. Bourke*, 6 Hill, 297; *Matter of Fitzgerald*, 2 Caines, 318; *Ex parte Schroeder*, 6 Cowen, 603; *Matter of Bonnafé*, 23 N. Y., 179.

As to when a mere sojourner may be arrested and when he will be discharged, see ante, p. 307 note.

The district courts of the United States, as courts of admiralty, have jurisdiction of torts committed on the high seas without reference to the nationality of the vessel on which they are committed, or that of the parties to them.

Such jurisdiction will, in the discretion of the court, be declined in suits between foreigners, where it appears that justice would be as well done by remitting the parties to their home forum.

But where the suit is between foreigners, who are subjects of different governments, and therefore have no common home forum, the jurisdiction will not be declined: *Bernhard v. Creene*, 3 Sawyer, 230; see 14 Eng. Rep., 440 note, Id., 640 note.

As to when larceny in foreign countries will be punished in this country, see 1 *Monthly Western Jurist*, 337; 14 Eng. Rep., 640 note; *People v. Murphy*, 51 Cal., 376.

As to when wound inflicted in one country or state and death in another, see 14 Eng. Rep., 642 note; 1 *Russell on Crimes* (9th Am. ed.), 753.

Where the residence of a party is shown to have once been at a particular place, it is presumed, under the statute as to testimony taken *de bene esse*, to continue there until a change is shown: *Nixon v. Palmer*, 10 Barb.,

175 ; reversed, but on another point, 8 N. Y., 398 ; Bronner v. Frauenthal, 37 N. Y., 169 ; Pfontz v. Comford, 36 Penn. St., 420.

The law presumes that all persons reside in the locality where they are found : Allen v. Stone, 9 Barb., 61.

Evidence by an old settler in a locality that he does not know and never heard of a person is *prima facie* evidence that he is not a resident thereof : Thomas v. Ross., 8 Wend., 672.

[Law Reports, 1 Chancery Division, 282.]

V.C.H., Dec. 17, 1875.

* *In re AYLES' TRUSTS.*

[282]

Bequest by a Grandfather—Illegitimate Children—Daughter—Reputation.

A testator, in 1839, gave property to trustees in trust to pay the income to his "daughter A., the wife of J. H.," for life, and to divide the principal between all the children of his daughter A. when they should attain twenty-one in equal shares, and in case all the children of his daughter A. should die under twenty-one without issue there was a gift over in favor of a son. For some time prior to the date of the will and the death of the testator in 1840, J. H. and the daughter A. were living together as man and wife at B., where the testator resided until within a few months of his death. They were married in 1845. Three children were born before the marriage—one before the testator's will and two after his death. One child was born after the marriage:

Held, that the legitimate child only was entitled to the bequest.

Occleston v. Fullalove (1) and *Dorin v. Dorin* (2) discussed.

JOHN AYLES, of Burley, Southampton, by will, dated in March, 1839, gave to trustees the sum of £450 upon trust to invest, and to pay the income "to my daughter Ann, the wife of James Hicks, for her separate use for life," without power of anticipation, and to divide the principal between "all the children of my daughter Ann as and when they shall respectively attain the ages of twenty-one years in equal shares." There were clauses of survivorship and maintenance; and in case all the children of the testator's daughter Ann should die under the age of twenty-one without issue, there was a gift over in favor of his son John. The testator gave the rents and profits of some cottages and land to his daughter Ann for life, and directed that after her death the property should be sold, and the proceeds invested and be held by the trustees upon the same trusts as directed in reference to the sum of £450.

The testator died in 1840. For some time previously to his death, and at the dates of the will and his death, James Hicks and the daughter Ann were living together as man and wife at Burley, where the testator resided until within a few months of his death, but no ceremony of marriage had been or was gone through till *the 10th of [283

(1) Law Rep., 9 Ch., 147; 8 Eng. Rep., 788.

(2) Law Rep., 7 H. L., 568; 13 Eng. Rep., 90.

October, 1845, when they were married. Three children were born before the marriage—one before the testator's will and two after his death, and one, the petitioner, after the marriage. They were all baptized and described as the children of James and Ann Hicks. The daughter Ann died on the 2d of October, 1871, having received the income, and the rents and profits during her life. The real estate had been sold. The money had been paid into court. The petitioner claimed to be entitled to the whole of the property.

Dundas Gardiner, for the petitioner, after stating the facts, asked for a declaration that he was entitled to the whole of the property, submitting that there was clearly no intention to provide for illegitimate children.

Mander, for respondents—illegitimate children of the daughter Ann—contended that, as the testator must have known all the facts and circumstances connected with his daughter and James Hicks, and their firstborn child, as they were all residing at Burley, where the testator had the opportunity of seeing them daily, they had acquired the reputation (or at any rate the one who was born before the testator's will and death had) of being the children of James Hicks and his daughter; and that upon the authority of the decisions in *Occleston v. Fullalove* (*), *In re Brown's Trusts* (*), and *In re Goodwin's Trusts* (*), they were entitled to share in the property.

Badcock, for the trustees, and *Speed*, for a respondent interested in the gift over.

Gardiner, in reply, referred to the case of *Dorin v. Dorin* (*).

HALL, V.C.: I do not think that the case of *Occleston v. Fullalove*, and other cases of the same class, apply to a case like the present. That case was the case of a father or 284] reputed father of children. The *case of *Dorin v. Dorin* (*) clearly shows that the word "children" must be taken to mean legitimate children, as much as if the word "legitimate" had been introduced before it, and that it cannot, in cases like the present, be construed to include illegitimate children. Therefore the petitioner, the legitimate child, is entitled to the whole of the property after the payment of all the costs of the petition.

Solicitors: *Valpy & Chaplin*; *Dawson, Bryan & Dawson*, agents for *W. Reade, Ringwood*; *C. P. Titt*; *Vizard, Crowder & Co.*, agents for *Davy & Davy, Ringwood*.

(1) Law Rep., 9 Ch., 147.

(2) Law Rep., 16 Eq., 239.

(3) Law Rep., 17 Eq., 345.

(4) Law Rep., 7 H. L., 568.

(5) Law Rep., 7 H. L., 568.

[Law Reports, 1 Chancery Division, 285.]

C.J.B., Dec. 2, 1875.

**Ex parte* HALE. *In re* BINNS.

[285]

Bankruptcy—Landlord—Distress for Rent—Rent accrued due after Commencement of Liquidation—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 23, 31, 34.

When the trustee of a liquidating debtor continues in possession of premises of which the debtor was tenant, not having disclaimed the lease, the landlord has a right, as against the trustee, to distrain, without obtaining any leave from the court, for rent accruing due after the commencement of the liquidation, even though it be rent which, under the terms of the lease, is payable in advance.

THIS was an appeal from a decision of the judge of the Huddersfield County Court.

On the 24th of June, 1875, Thomas Binns, a woollen manufacturer at Huddersfield, filed a liquidation petition, under which Thomas Westerby was, on the 14th of July, appointed trustee.

On the 27th of May, 1875, an agreement in writing had been entered into between Thomas Hale and Binns, whereby Hale agreed to let and Binns agreed to take from the 15th of February, 1875, the top floor of a mill belonging to Hale, called River Mill, and Hale agreed to find and provide the main line shafting and steam power for working certain machinery which Binns intended to have and use on the premises. And it was agreed that Binns should pay on the 15th of February, 1875, £35 for one quarter's rent in advance, on the 15th of May £29 3s. 4d. for rent up to the 1st of August, 1875, and on the 1st of August, 1875, £55 for one quarter's rent in advance, and should make other subsequent payments.

At the commencement of the liquidation there were in the floor which Binns occupied certain machinery and goods belonging to him, of which the trustee took possession. The trustee did not disclaim the lease, nor did he expressly adopt it, but he continued in actual possession of the demised premises for the purpose, as he said, of winding up the estate. There was evidence on the part of Hale that since the liquidation commenced he had continued to supply steam power under the agreement just as before.

On the 12th of August, 1875, Hale levied a distress for the £55 *rent which became due on the 1st of August, [286 and under this distress some of the machinery and other goods were seized. No application had been made to the court for leave to levy this distress. The judge, on the

application of the trustee, made an order restraining Hale from proceeding with his distress.

Hale appealed.

Robson, for the appellant: There is nothing in the Bankruptcy Act, 1869, to take away the landlord's statutory right to distrain. Sect. 34 (1) does not apply to rent accrued due after the commencement of the liquidation. The trustee, not having disclaimed under the provisions of sect. 23, was occupying the premises under the terms of the agreement, and was subject to the ordinary liabilities of a tenant.

Joseph Beaumont, and *Priestly*, for the trustee: Under sect. 31 the landlord is enabled to prove for rent accruing due after the commencement of the bankruptcy. This he could not do under the former law. Moreover, sect. 34 differs from sect. 129 of the Bankrupt Law Consolidation Act, 1849, which dealt with the landlord's right to distrain for rent. Sect. 129 was a disabling clause, whereas sect. 34 is an enabling clause. The reasonable inference is that the right of distress for rent accruing after the commencement of a bankruptcy was not intended to remain. That right does not, as we contend, exist unless the trustee has expressly or impliedly adopted the lease. So long as the lease may or may not be adopted on behalf of the bankrupt's estate, the right of distress is limited by sect. 34, and the right of proof is regulated by sect. 31.

[They referred to *Ex parte Llynvi Coal and Iron Company* (1).]

287] *BACON, C.J.: If I were to accede to Mr. Beaumont's argument, the consequence would be that a trustee in bankruptcy might make use of a man's property without paying any rent for it, and might snap his fingers at him. The meaning of sect. 34 is that, if a landlord has been so weak as to allow his tenant to get into arrear with his rent for more than a year, he can, in the event of the tenant's bankruptcy, only prove as an ordinary creditor for the arrears beyond the year. It does not restrain his rights in

(1) Section 34: "The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that, if such distress for rent be levied after the commencement of the bankruptcy,

it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due for which the distress may not have been available."

(2) Law Rep., 7 Ch., 28.

any other way. There is no ground whatever for this injunction, and the order must be discharged.

Solicitors for landlord: *Layton & Jaques*, agents for *Clough & Son, Huddersfield*.

Solicitors for trustee: *Learoyd & Co.*, agents for *Learoyd, Learoyd & Morrison, Huddersfield*.

An executor, a general assignee for the benefit of creditors, a receiver, etc., who enters into possession and occupies lands demised to the testator, assignor, etc., is liable personally to the landlord for such rent: *Jermain v. Pattison*, 46 Barb., 9; *Journey v. Brackley*, 1 Hilton, 447; *Young v. Peyser*, 3 Bosw., 308; *Morton v. Pinckney*, 8 Bosw., 135, 139; *Todd v. Cameron*, 2 Upp. Can. Err. and App., 484; 3 Redfield on Wills, 319 marg. p.

See *Earl of Donoughmore, Irish L. R.*, 5 Com. Law Rep., 443; *Lewis v. Burr*, 8 Bosw., 140.

So in his representative capacity: *Pugsley v. Aikin*, 11 N. Y., 494; 3 Redf. on Wills, 282, 319 marg. p.

But see *Lewis v. Burr*, 2 Am. Law Reg., N.S., 301, 8 Bosw., 140; *Denniston v. Hubbell*, 10 Bosw., 155; *Jones v. Hausmann*, 10 Bosw., 168.

Though it seems not for the rent named in the lease to the lessee, but only for the value of the use and occupation: *Jermain v. Pattison*, 46 Barb., 12; 3 Redf. on Wills, 319 marg. p.

But see *Ansel v. Robson*, 2 Crompt. & Jervis, 610; *Grattan v. Wall*, Irish Law Rep., 2 Com. Law, 484; *Pugsley v. Aikin*, 11 N. Y., 474.

He may notify the lessor and surrender the premises, when he will not be liable for the rent beyond the assets in his hands: *Jermain v. Pattison*, 46 Barb., 12; 3 Redf. on Wills, 319, marg. paging.

Though as he is liable only as assignee of the lease, his personal liability ceases as soon as he assigns and surrenders possession of the premises to his assignee: *Journey v. Brackley*, 1 Hilt., 447; *Young v. Peyser*, 3 Bosw., 308; *Liefke v. Koch*, 31 How. Prac. Rep., 383; 3 Redfield on Wills, 309, marg. p.

See *Trabue v. McAdams*, 8 Bush (Ky.), 74.

A lessor who assigns a lease after rent has become due may recover it of the lessee, for that does not pass by

the assignment as incident to the estate: *Phelps v. Van Dusen*, 4 Trans. App., 399.

Though not for rent becoming due after the assignment: *Perdue v. Hays*, 31 Upper Can. Q. B., 111; *Childs v. Clark*, 3 Barb. Chy., 52.

An under-tenant is not liable to the lessee for the rent, but an assignee of the lease is; and the law presumes that one who occupies is an assignee: *Bedford v. Terhune*, 30 N. Y., 453; *Colt v. Planer*, 4 Abb., N.S., 140, 7 Rob., 413, 2 Sweeny, 78; *Glover v. Wilson*, 2 Barb., 264.

A lessor cannot recover upon a complaint for use and occupation, when it appears from the evidence that there was a lease of the premises to other parties, and that the defendants were in as assignees of the term. But in such case the court may, on the trial, allow an amendment of the complaint to conform to the proof and permit a recovery for the rent due on the lease, when it does not appear that the defendants are surprised by the amendment: *Bedford v. Terhune*, 30 N. Y., 453, 27 Howard, 422.

Although an assignee of a lease is liable for the rent which falls due after the assignment: *Graves v. Porter*, 11 Barb., 592; *Van Rensselaer v. Smith*, 27 id., 104; *Carter v. Hammett*, 12 id., 253, 18 id., 608; *Main v. Feathers*, 21 id., 646; *Van Rensselaer v. Bonesteel*, 24 id., 365; *Demainville v. Mann*, 32 N. Y., 197; *McKeon v. Whitney*, 3 Den., 452; *Van Rensselaer v. Gallup*, 5 Den., 454; *Glover v. Wilson*, 2 Barb., 264; *Childs v. Clark*, 3 Barb. Chy., 52; *Selby v. Robinson*, 15 Upp. Can. Com. Pl., 370.

See *Bourke v. Bourke*, Irish L. R., 8 Com. L., 231.

Still he is not liable for the rent of a new story put on after the original lease under a new agreement, although the use of the story passes by the assignment: *Colt v. Brannsdorf*, 2 Sweeny, 74.

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An assignee of a lease, remaining in possession, is liable for the rent after he mortgages the property: *Main v. Green*, 32 Barb., 449, 33 id., 136.

Though the mortgagee who has not entered into possession is not: *Childs v. Clark*, 3 Barb. Chy., 52.

The assignee of the lessor is entitled to recover rent falling due after the assignment: *Main v. Feathers*, 21 Barb., 646; *Van Wicklin v. Paulson*, 14 id., 654; *Marshall v. Moseley*, 21 N. Y., 280; *Fay v. Hollerain*, 35 Barb., 295.

If the assignor of the lease reserve a single day of the term, the assignee is an under-tenant and not liable for the rent: *Davis v. Morris*, 35 Barb., 227, 36 N. Y., 569.

Though one to whom he transfers the whole term of a part of the premises is an assignee though he take under a lease. The form of the transfer is

immaterial. The relation of landlord and tenant does not exist between them: *Woodhull v. Rosenthal*, 61 N. Y., 382; *Demainville v. Mann*, 32 N. Y., 197; *Astor v. Miller*, 2 Paige, 68; *Van Rensselaer v. Gallup*, 5 Den., 454; *Van Horn v. Crain*, 1 Paige, 455; *Childs v. Clark*, 3 Barb. Chy., 52.

See *Main v. Green*, 32 Barb., 449, 33 id., 136.

As soon as an assignee assigns he ceases to be liable: *Van Schaaick v. Third Av. R. R.*, 25 Howard, 446, reversing 8 Abb., 380; *Liefke v. Koch*, 31 id., 383.

Though the original lessee cannot by assignment relieve himself from liability for the payment of the rent unless the lessor accepts the assignee as his tenant: *Shine v. Dillon*, *Irish Law Rep.*, 1 Com. Law, 277; *House v. Burr*, 24 Barb., 525.

[Law Reports, 1 Chancery Division, 290.]

C.J.B., Dec, 6, 1875.

290] *Ex parte WINDER. In re WINSTANLEY.

Act of Bankruptcy—Bill of Sale—Assignment of whole Property to secure past Debt and further Advances—Parol Agreement to make further Advances—Subsequent Advances made—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, subs. 2.

An assignment of substantially the whole of a mortgagor's property to secure a previously existing debt and further advances is not an act of bankruptcy, if there is a contemporaneous parol agreement on the part of the mortgagee to make further advances to a sufficient amount, and such advances are afterwards in fact made, even though the deed contains no covenant or obligation on the part of the mortgagee to make any further advances.

THIS was an appeal from a decision of the judge of the Wigan County Court.

John Winstanley was a brass founder at Wigan. Messrs. Winder & Harrop were wholesale lead merchants at Manchester. At the beginning of December, 1874, Winstanley was indebted to them in the amount of £287 for goods supplied by them to him for the purposes of his trade. He sent them an order for more goods, but they, having heard that he was surety to a large amount for a person named Leyland, who had then lately failed, before supplying any more goods, asked Winstanley for security for the debt 291] *which he owed them, and he agreed to give them a bill of sale of his stock-in-trade and other property. The bill of sale was executed on the 11th of December, 1874. It recited that Winstanley was the lessee of the Caledonian brass foundry in Wigan, for the residue of a term of four-

teen years, computed from the 1st of April, 1867; that he was indebted to Winder & Harrop in the sum of £287 for goods supplied to him by them; and that they had agreed at his request to give him further time for the payment of the £287, and also to give him further credit for goods to be supplied to him by them, so that the whole amount owing should not exceed £500, upon condition that the moneys so owing or to become owing by him, with interest, should be secured in manner thereafter expressed. And it was thereby witnessed that in consideration of the £287, and of the sums (if any) thereafter to become owing by Winstanley to Winder & Harrop, he thereby assigned to them, first, all the machinery, engines, boilers, stock, plant, trade fixtures, chattels, and effects then standing and being in or upon his works and premises, and also all such things of a like nature which should at any time or times during the continuance of the security be erected on, added to, or brought upon the premises; secondly, all his household furniture and effects in his dwelling-house, and also all the household furniture and effects which should at any time thereafter during the continuance of the security be brought into his dwelling-house, or any other dwelling-house which he might occupy: To hold the same, subject to redemption on payment by Winstanley upon demand, or within twenty-four hours after demand, of the £287 and such further moneys (if any) as should for the time being be owing to Winder & Harrop under the covenants and provisions thereafter contained. There was a proviso that, if default should be made in payment of the moneys thereby secured, or any part thereof, for twenty-four hours after payment thereof had been demanded by the mortgagees, it should be lawful for the mortgagees to take possession of the property and to sell the same and pay themselves the moneys due to them. There was no covenant on the part of Winder & Harrop to supply Winstanley with any more goods on credit.

The bill of sale was registered on the 21st of December, 1874. *At the date of its execution Winstanley, in [292 addition to the property comprised in it, possessed the lease of his business premises, book debts, which he estimated as worth £650, and the equity of redemption of his dwelling-house, which he valued at £100. At the same time he owed debts to the amount of £8,000. Shortly after the execution of the deed Winder & Harrop supplied him with more goods on credit, and on the 10th of May, 1875, he owed them £560 3s. 6d. for goods supplied. On that day Winder & Harrop made a formal demand for payment, and on the

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11th of May they took possession of the property comprised in the bill of sale. On the 10th of June, 1875, a bankruptcy petition was presented against Winstanley, the act of bankruptcy alleged being the execution of the bill of sale, and on the 23d of June he was adjudicated a bankrupt. The debts proved in the bankruptcy amounted to £8,183. Of these £7,000 were debts which had been due at the time when the bill of sale was executed. On the 15th of July, 1875, the creditors resolved to sell the whole of the bankrupt's estate for £1,350.

The trustee made an affidavit in which he stated that he had made a careful examination of the books of the bankrupt which had come into his hands, and that from them it appeared that at the time when the bill of sale was given, and for some time previously, the bankrupt was hopelessly and irretrievably insolvent. The trustee further stated that he had made careful inquiries in order to ascertain what property the bankrupt possessed at the date of the execution of the bill of sale, and that to the best of his knowledge, information, and belief the bill of sale included substantially the whole of the bankrupt's property, and the only property of the bankrupt not included in it consisted of book debts of small amount and questionable value.

On the 11th of August, 1875, the judge made an order declaring that the bill of sale was an act of bankruptcy and void as against the trustee, and that the property comprised in it belonged to the trustee. From this order Winder & Harrop appealed.

De Gex, Q.C., and *Bagley*, for the appellants: The evidence shows that the bill of sale did not comprise all the bankrupt's property; on the contrary, there was a very 293] *substantial exception. The execution of the bill of sale did not, therefore, amount to an act of bankruptcy.

But even if the deed did comprise substantially the whole of the property, still there was, as appears by the recitals, parol agreement by Winder & Harrop to supply further goods on credit, and thus to enable the bankrupt to carry on his trade, and further goods beyond the amount agreed upon were in fact supplied. This is sufficient to support the deed: *Ex parte Bolland* (1); *Ex parte Chester* (2).

(1) 20 W. R., 862.

(2) C. J. B., 1874. Nov. 16.

Ex parte CHESTER.

In re DUNGATE.

THIS was an appeal from a decision of the judge of the Hastings County Court.

Dungate, a trader, executed, on the 17th of April, 1874, a bill of sale of all his furniture and other effects mentioned in the schedule, to Chester, to secure the payment of a then existing debt of £160 and any further sums which might become due from Dungate to Chester. The schedule did not in-

When a bill of sale is executed *bona fide* with the view of enabling *a trader to carry on his business, it is not [294 an act of bankruptcy: *Bittlestone v. Cook* (¹); *Pennell v. Reynolds* (²). *Chase v. Goble* (³) shows that when the deed does not in terms assign the whole property, the *onus* of proof is on those who assert that it did so in fact.

Little, Q.C., and *Smyly*, for the trustee: The execution of the bill of sale was the act of bankruptcy on which the adjudication was founded. The bankrupt was utterly insolvent when he executed it. The deed included all his tangible property. The only things omitted from it were a valueless equity of redemption, the lease of the business premises, which was probably worth nothing, and the book debts. Even if the latter were worth, as is said, £650, that was an insignificant sum compared with the bankrupt's then indebtedness of £8,000. The deed was purely one-sided; the mortgagee was under no obligation to make any further advances. The making of further advances voluntarily, there being no obligation to make them, will not support the deed: *Lindon v. Sharp* (⁴). *Ex parte Bolland* (⁵) and *Ex parte Chester* are distinguishable from the present case. In *Bittlestone v. Cook* the debtor obtained a present actual advance, and the deed was not a security for a past debt. In

clude by description Dungate's stock-in-trade or his book debts. There was no covenant by Chester to make any further advances. But Chester had made a verbal promise to Dungate that, if the latter would give the bill of sale, the former would continue to supply him with goods on credit up to the value of £200, and goods to a considerable amount were afterwards supplied. Dungate, in June, 1874, filed a liquidation petition. The bill of sale was duly registered, and possession was taken of the property by the mortgagee three days before the petition was filed. The judge declared this bill of sale to be void as against the trustee. Chester appealed.

De Gez, Q. C., and *E. C. Willis*, for the appellant.

Finlay Knight, for the trustee.

BACON, C.J., said that he could not find that the deed was an assignment of the whole of the bankrupt's property. It was an assignment only of what was mentioned in the schedule, and the stock-in-trade and book debts were not mentioned there. But, even

if it had been otherwise, he thought that the execution of the deed was by no means an act of bankruptcy. The bankrupt was in need of further credit, and he induced the mortgagee to accept this security for his then existing debt, and for such further supplies of goods on credit as he might require. The clear consideration for the deed was the agreement that the mortgagee would continue to supply goods, and the goods so supplied were the very means which enabled Dungate to continue his business. The mortgagee was entitled to retain the property, and the order of the County Court must be discharged.

From this decision the trustee appealed, and on the 12th of December, 1874, the appeal was dismissed by the Lords Justices, on the ground that it was not proved that the whole of the debtor's property was included in the bill of sale.

(¹) 6 E. & B., 296.

(²) 11 C. B. (N.S.) 709, 720.

(³) 2 Man. & G., 930.

(⁴) 6 Man. & G., 895.

(⁵) 20 W. R., 862.

Pennell v. Reynolds there was a present advance. *Ex parte Foxley* ⁽¹⁾ is a case precisely in point, and there the bill of sale was held to be an act of bankruptcy.

BACON, C.J.: I think the order cannot be sustained. The statute prohibits a fraudulent transfer by a debtor of the whole or any part of his estate. It has to be considered, therefore, with regard to every transaction by which a debtor parts with his property, whether it has been fraudulent within the meaning of the statute or within the well-established law in bankruptcy. These are the facts which I have to consider in the present case before I impute fraud. The debtor was in trade; he owed £287 to the present appellants, and he wanted further credit from them to enable him to 295] carry on his *trade. He asked them to give him further credit. They said, We will not give you credit unless you give us security, and thereupon he gives them a security. What fraud is there in that? How can I impute to the debtor a fraudulent intention? Not only can I find no trace of any fraudulent intention on his part, but the transaction seems to me to be as honest a one on both sides as can be conceived: most honest on the part of the debtor, who wanted to carry on his trade, whose only object in asking for the further supply of goods was that he might be enabled to carry on his trade. He cannot get that supply of goods except on the terms of giving a security, which the creditors have a good right to require from him, and so the bill of sale is executed. It is said that the bill of sale comprehended the whole of his estate. It is quite clear that, literally, it did not. How much it comprehended I have not, nor had the learned judge of the County Court, the means of perfectly ascertaining. But it appears from the evidence given that at least £600 worth of book debts were excluded from the assignment, because all that the trustee says is that the book debts were of small amount and questionable value. When a trustee, who has the means of looking into the bankrupt's books and satisfying himself upon that particular point, says only that the book debts were of small amount and questionable value, I cannot prefer that vague statement of his, or indeed ascribe any weight to it, in opposition to the plain statement on the other side that they were worth £600 or £700. In considering the fraudulent motive which is ascribed to the bankrupt, which is the root and basis of this case, it is very material to observe that his object was to carry on his trade; that he secured that object by procuring a supply of goods upon

(1) Law Rep., 6 Ch., 515.

credit from the present appellants, and that he retained in his own hands the management of his book debts, because they were essential to the very object for which he asked the credit, viz., to enable him to carry on his trade. These facts are uncontradicted. So far from there being any fraudulent intention on the part of the debtor, I think that the arrangement is just that which any man in his circumstances might honestly and reasonably enter into, his object being to pay all his creditors—to pay them by the exercise of his trade, and therefore to acquire the means of carrying on that trade. There is not a word in the bill of sale which excites the slightest suspicion or doubt in my mind *with regard either to the appellants or to the debtor. [296 It is said that it contains no covenant by the mortgagees to make further advances. It is not necessary that it should. One feature in the case of *Ex parte Foxley* (¹), as well as in *Pennell v. Reynolds* (²), and many other cases, was the absence of a stipulation to make further advances. But here I find the plainest possible stipulation to do so, though it is true there is no binding covenant. But it would be inconsistent with the very nature of the deed that there should be a binding covenant to supply further goods in any event, for there is a power for the grantees at any time to demand payment of what is due to them, and if that payment was not made, of course they would have a perfect right to refuse to make any further advances. But there is a plain stipulation that the appellants intend to make further advances. Nobody who reads the deed can doubt that it does not come within those cases where, there being no such stipulation, the decision was one way; but where, it is just to infer, that, if there had been such a stipulation, the decision would have been the other way. But it is not only that stipulation which I have to consider. I am bound also to consider what was the intention of the parties to this transaction. What are the facts? As soon as the deed was executed, supplies of goods were obtained by the debtor from the appellants in the ordinary course of his trade; not sham advances—not bills, but a positive delivery of the goods which were necessary for, and were employed by the bankrupt in, the carrying on his trade, and this was continued down to the time when the appellants found it necessary to put their security in force. I think the evidence is all on one side. There is no fact from which I can infer that the bankrupt intended to make a fraudulent disposition of his property. On the contrary, I think that he made a dispo-

(¹) Law Rep., 3 Ch., 515.

(²) 11 C. B. (N.S.), 709.

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sition of his property which he was perfectly competent to make; that he made an honest bill of sale, which is a valid security to the appellants. The order of the learned judge must, therefore, be discharged.

Solicitors for appellants: *Shaw & Tremellen*, agents for *J. H. Dewhurst, Manchester*.

Solicitors for trustee: *Chester, Urquhart & Co.*, agents for *Dawson & Scowcroft, Bolton*.

[Law Reports, 1 Chancery Division, 297.]

C.J.B., Dec. 13, 1875.

297] **Ex parte* TREVOR. *In re* BURGHARDT.

Act of Bankruptcy—Assignment of whole Property to secure past Debt—Assignment of all separate Assets—Partnership Assets not included—Bill of Sale—Power to seize—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, sub s. 2.

One of two partners in trade assigned the whole of his separate assets, and gave a power of attorney to assign all his personal property, as security for a previously existing separate debt. The partnership was at this time insolvent:

Held, that the execution of the deed was an act of bankruptcy, notwithstanding the fact that none of the partnership assets were in terms included in the deed.

A bill of sale contained a provision that it should be void in case the mortgagor should pay the principal money thereby secured "upon demand, if and when the mortgagee should so require by a notice in writing," and until payment of the principal should pay interest thereon half-yearly, and also a proportionate part thereof "to the expiration of the said notice, when the same shall be given." And in default of payment power was given to the mortgagee to seize and sell the property comprised in the deed.

Seemle, that the mortgagee was not entitled to seize on the same day on which he made a demand for payment, the demand not being at once complied with.

THIS was an appeal from a decision of the judge of the Manchester County Court.

Francis Burghardt and Augustus Krenels were merchants in partnership. On the 6th of April, 1875, they filed a liquidation petition, under which C. R. Trevor was appointed trustee.

On the 16th of March, 1875, Burghardt applied to Robert Aders, who had formerly been in partnership with him, for a loan of £700 on his private account. He said that he only wanted the money for a few days. Aders lent it to him. About the end of March Aders heard unfavorable rumors as to the solvency of Burghardt's firm, and on the 1st of April he wrote to him that, if he did not at once repay the temporary loan or give him a proper security for it, he should institute legal proceedings against him to recover it, and should also take steps in bankruptcy against him. No answer having been sent to this letter, Aders placed the matter in the hands of his solicitor, who, on the 2d of April,

issued a writ against Burghardt for the £700. Upon being *served with the writ Burghardt offered to give a bill [298 of sale of his furniture to secure the debt. This was agreed to, and on the 3d of April the bill of sale was executed, and proceedings in the action were stayed.

The bill of sale contained a recital that, in consideration of Aders forbearing the further prosecution of the action for the £700, Burghardt had agreed to make the assignment thereafter contained for securing the repayment of the £700, and it was witnessed that Burghardt did thereby assign unto Aders all and every the household goods and furniture and other the chattels and effects then in, about, and belonging to the dwelling-house and premises then in the occupation of Burghardt, to have and to hold the same to Aders, subject to the proviso for redemption thereafter contained. And for the more effectually securing to Aders the payment of the £700 and interest, Burghardt appointed Aders his attorney, in his name at any time or times thereafter "to sign, seal, and deliver, or by delivery to make and perfect, any assignment or delivery of any goods, chattels, or other personal estate or effects not passing by the effect of this assignment, and to which Burghardt shall, before the satisfaction of this security, become beneficially possessed or entitled, and all the estate of Burghardt therein and thereto, to a purchaser or purchasers, or otherwise," and also to demand, sue for, receive, and give valid discharges for any rights or claims in respect of all or any of the said goods, chattels, effects, and premises. There was a proviso making void the deed in case Burghardt, his executors or administrators, should pay to Aders, his executors, administrators, or assigns, the £700 "upon demand, if and when he or they shall so require by a notice in writing," to be given or left for Burghardt, his executors or administrators, and in the meantime, until payment of the £700, pay interest thereon half-yearly, and "also a proportionate part thereof to the expiration of the said notice when the same shall be given." And it was thereby declared that, in case default should be made in payment of the £700 and interest, or any part thereof, contrary to the tenor and effect of the aforesaid proviso, it should be lawful for Aders, his executors, administrators, or assigns, to take possession of and to hold and enjoy the goods, chattels, and premises thereby assigned, *and also to sell and dispose thereof, and of [299 the goods, chattels, and effects to be comprised in any assignment to be made of the furniture, property, and effects of Burghardt, in pursuance of the power thereinbefore con-

tained, or any part thereof, at discretion, and to repay themselves out of the moneys arising from the sale, the principal and interest due, and to pay over the surplus (if any) to Burghardt, his executors, administrators, and assigns. And it was declared that until default should be made "in payment of the £700, or any part thereof, at the time to be appointed by the notice to be given as aforesaid, or until default should be made in payment of the interest, or any part thereof, at the respective times thereinbefore appointed for payment thereof, it should be lawful for Burghardt, his executors and administrators, to retain possession of the goods, chattels, and premises thereby assigned. And Burghardt thereby covenanted with Aders that he, his heirs, executors, or administrators, would, on demand by the notice to be given as aforesaid, pay to Aders, his executors, administrators, or assigns, the £700, or so much thereof as might be then owing, with interest thereon; and in the meantime, and until such payment should be made, would pay to Aders, his executors or administrators, interest for the £700, or so much thereof as should for the time being remain unpaid, half-yearly.

Soon after the execution of this bill of sale Aders again heard unfavorable rumors about Burghardt's firm; and on the 5th of April he instructed his solicitor to take steps to enforce the security. On the same day his solicitor wrote a letter to Burghardt, demanding immediate payment of the £700 and interest, and stating that, in the event of payment not being made, Aders would proceed to enforce the security for his own protection. Payment not having been made, a Mr. Mercer on the same day took possession, on behalf of Aders, of Burghardt's furniture under the bill of sale, having previously made a demand on him personally for payment. The next day the liquidation petition was filed. The trustee afterwards applied to the court for an order declaring the bill of sale void against him as an act of bankruptcy. It was admitted that Burghardt had no separate property other than the furniture comprised in the deed, and the trustee deposed that on the 3d of April the 300] debts of the partnership were *£31,216, and that their assets would realize about £5,000. Also that Burghardt's separate liabilities were £7,462. The judge held that the bill of sale was valid.

The trustee appealed.

Little, Q.C., and Winslow, Q.C., for the appellant: The County Court judge held that the bill of sale was good, on the ground that it included only Burghardt's household

furniture. We contend, however, that the terms of the deed are large enough to include the whole of the mortgagor's personal property, even his interest in the surplus (if there had been any) of the partnership assets after payment of the partnership debts. The execution of such an assignment to secure a past debt was an act of bankruptcy.

Moreover, the seizure of the property which was made by Aders was not authorized by the deed. It was not intended that there should be a power to seize contemporaneously with the making of the demand for payment. Some interval was to elapse. The provision that interest should be paid "to the expiration of the notice" makes this clear.

[They were stopped by the court upon the first point.]

Jordan, and *Finlay Knight*, for Aders: An assignment of a part of a trader's property to secure a past debt, if made under pressure, is valid: *Smith v. Timms* ⁽¹⁾. Partners are in effect joint tenants of the partnership assets, without any *jus accrescendi*. Each partner is owner of the whole of the partnership assets. It is true that the equitable interest of each partner is only his share of the surplus of the partnership assets after payment of the partnership debts. But for the purpose of determining the question whether the execution of the bill of sale was an act of bankruptcy, the court must look only at the visible tangible assets, not at the solvency or insolvency of the assignor. In *Smith v. Timms*, and other cases like it, of course the assignor was insolvent, or the question would never have arisen. When a man who is insolvent gives a bill of sale of part only of *his [301] assets, if an account of his debts was taken it could not be said that he had any property not comprised in the bill of sale. But in such cases the court has always regarded the amount of the actual visible assets, without any reference to the debts. So here, the partnership assets should be taken into account without any reference to the partnership debts. And if that is so, it is clear that the bill of sale did not comprise anything like the whole of Burghardt's property.

BACON, C.J.: That this deed was an assignment of the whole of the bankrupt's estate is as plain as anything can well be, and, as it was made only to secure a previously existing debt, its execution was an act of bankruptcy. The deed purports to assign all the bankrupt's chattels in a particular house, and power is also given to the mortgagee to assign and deliver to a purchaser all the bankrupt's estate of any kind whatever. He either could or could not assign the partnership assets to secure his own private debt. If

(1) 1 H. & C., 849.

he could, he has done so by this deed. But in truth he had by law no power to do so. Under such an assignment the assignee would take no interest until all the partnership debts had been paid. Whichever way you look at it, the execution of this deed was an act of bankruptcy. At the time when it was executed the firm, as well as Burghardt, was utterly insolvent. The possibility, therefore, of there being anything to come from his interest in the surplus of the partnership assets was out of the question. The execution of the deed was as plain an act of bankruptcy as was ever committed.

Though I did not hear the argument out upon the construction of the deed, I do not wish to part with the case without saying that, according to my present opinion, the mortgagee had no right to take possession when he did. The condition upon which his power to do so was to arise had not been complied with. The appeal must be allowed.

Solicitors for trustee: *Johnson & Weatheralls*, agents for *E. Storer, Manchester*.

Solicitors for mortgagee: *Rowley, Page & Rowley, London and Manchester*.

[Law Reports, 1 Chancery Division, 302.]

C.J.B., Dec. 20, 1875.

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**Ex parte Cox. In re REED.*

Reputed Ownership—Order and Disposition—Post-nuptial Settlement of Furniture—Costs of Appeal—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 15 (subs. 5), 91, 92.

A husband and wife, at a time when the wife was under age, executed a deed which purported to convey freehold property of the wife to a purchaser for £500. The deed was not acknowledged by the wife. The husband received the £500. The purchaser afterwards contracted to sell the property, and his sub-purchaser required the concurrence of the wife in the conveyance to him. The wife, who was then of age, refused to concur, unless the husband would execute a bill of sale of his furniture to a trustee for her, to secure the payment of £425 for her separate use. This was done by the husband; and she then executed the conveyance to the sub-purchaser. The bill of sale was registered. Possession of the furniture was given to the trustee by delivering to him a silver fork in the name of the whole, and the keys of the house where the furniture was. But the furniture remained, until the husband filed a liquidation petition, in the house which was occupied by him and his wife, and it was used by them:

Held, that the execution of the bill of sale amounted to a purchase of the wife's concurrence in the conveyance; that the possession was consistent with the terms of the deed; and that the wife's trustee was entitled to the furniture as against the trustee under the liquidation.

THIS was an appeal from a decision of the judge of the East Stonehouse County Court.

George Palmer Reed was a wine merchant at Compton Gifford. In the year 1869 the business was carried on by him in partnership with his father, and the firm wanted to borrow money from their bankers, but the bankers declined to lend any money without security. G. P. Reed's wife was entitled in fee to a freehold house in Plymouth, and he arranged with his father that the father should purchase the house from the wife for £500, and that the title deeds should then be deposited with the bankers as security for a loan to the firm. Accordingly, on the 3d of April, 1869, a deed was executed by G. P. Reed and his wife, by which they purported to convey the house to the father for £500. This sum was never paid to the wife, but credit was given for it to G. P. Reed in the partnership accounts. When this deed was executed, Mrs. Reed was under the age of twenty-one, and when she went to acknowledge the deed before a commissioner he refused to take her *acknowl- [303 edgment on the ground of her minority. The deed was consequently not acknowledged, but it was treated as a good deed, and was deposited with the bankers as security for a loan made by them to the firm.

Reed's father died in 1874, and in 1875 Reed, wishing to pay off the debt due to the bankers, contracted to sell the house. The purchaser took the objection to the title that the deed of April, 1869, had not been acknowledged by Mrs. Reed, and required that she should confirm the deed. Her husband then asked her to execute a deed of confirmation, but she, on the advice of her solicitor, refused to do so, except on the condition that the husband would give her security for the £500. Ultimately he consented to execute a bill of sale of his furniture to secure the payment of £425 to a trustee for her benefit, and on this bill of sale being executed, she executed the required deed of confirmation. The bill of sale was executed on the 30th of March, 1875. It was never registered. The trustee to whom the furniture was assigned discovered after its execution that it did not give him power to take possession till a year after its date, and he required another deed to be substituted for it. This was done. The substituted bill of sale bore date the 24th of May, 1875. It was made between Reed of the first part, his wife of the second part, and George Cox of the third part. It contained a recital that the wife, being seised in fee of the house in Plymouth, did, at the request and for the benefit of her husband, and during her minority, sell and dispose of the same, and that by a deed dated the 3d of April, 1869, she assumed to convey the said house to

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Joseph Reed and his heirs; and a recital that on a sub-sale of the house by the trustees of Joseph Reed, the purchaser required the execution of a deed of confirmation by the wife, but that, inasmuch as she had received no consideration for the conveyance to Joseph Reed, G. P. Reed, in order to obtain a confirmation of the conveyance, had agreed to make and execute to Cox, as trustee for, and for the benefit of the wife, a mortgage of his furniture as thereafter mentioned for £425, being the amount for which the house had then been sold, and in consideration thereof the wife had agreed to concur in the deed of conveyance to the sub-304] purchaser; and it was witnessed *that in pursuance of the said agreement Reed (at the request of his wife) assigned to Cox all the household furniture and effects in his dwelling-house, to hold the same, subject to a proviso for making void the deed, upon the trusts and with the power thereafter expressed. And there was a proviso that, if Reed should pay to Cox the £425, with interest, on demand, the deed should cease and be void, and a further proviso that, in case default should be made in payment of the £425 and interest, or any part thereof, on demand, it should be lawful for Cox, at the request of Mrs. Reed, to sell and dispose of the property; and Cox was to stand possessed of the moneys arising from the sale on trust, first, to pay the expenses of the sale, and next, to pay to and for Mrs. Reed, and for her sole and separate use and benefit, the sum of £425 and interest, or so much thereof respectively as should be then due, and as to the surplus on trust for Reed. The attestation clause stated, that at the time of the execution of the deed full and complete possession of the furniture and effects was given by the delivery of one silver fork in the name of the whole, upon the trusts in the deed mentioned. This deed was duly registered under the Bills of Sale Act. The keys of the dwelling-house were also delivered to Cox before the 25th of May. The furniture remained after the execution of the deed in the house, which was occupied by Reed and his wife, and it was used by them.

On the 25th of May, 1875, a sheriff's officer attempted to levy an execution on the furniture under a writ issued against Reed, but Mrs. Reed refused to allow him to do so, telling him that the furniture was hers, not her husband's. The officer entered into possession, and on the 29th of May a formal notice was served on him on behalf of Cox. An interpleader summons was then issued, and an interpleader issue was directed to be tried at the Summer Assizes between

Cox and the execution creditor; but before this could be done, Reed, on the 30th of July, 1875, filed a liquidation petition. The trustee under the liquidation claimed the furniture, and on the 17th of November the judge of the County Court made an order that the trustee was entitled to the sum of £267, the price of the furniture, which had been sold by arrangement. Cox appealed.

**G. W. Lawrance*, for the appellant: The wife's con- [305
currence in the conveyance to the sub-purchaser was a valuable consideration sufficient to support the bill of sale, and to prevent its being avoided either as a fraudulent preference under sect. 92, or a voluntary settlement under sect. 91 of the act. The only question, therefore, is whether there was a change in the possession of the furniture sufficient to exclude the operation of the reputed ownership clause (sect. 15, sub-sect. 5). If the settlement had been an ante-nuptial one, what took place would have been sufficient: *Jarman v. Woollaton* (*); *Simmons v. Edwards* (*). The principle of these cases applies equally to the question of possession under a post-nuptial settlement. And in *Ashton v. Blackshaw* (*) it was held that a post-nuptial settlement of furniture would have been good as against the creditors' assignee of the husband if it had been registered. Here the deed has been registered.

Horton Smith, for the trustee in the liquidation: The original conveyance of the freehold house conveyed, at any rate, the husband's interest in it during the joint lives of himself and his wife, an interest which he was competent to convey alone: *Gleaves v. Paine* (*); *Robertson v. Norris* (*). The whole purchase-money was received by the husband, and it must be assumed that the wife consented to his taking that part of it which represented her interest. If any subsequent confirmation by the wife was required, that was for the benefit of the purchaser, from whom, not from the husband, the consideration ought to have moved. The bill of sale ought, therefore, to be considered as voluntary on the part of the husband, and void under sect. 91 or sect. 92 of the act.

BACON, C.J.: In my opinion this bill of sale was not, properly speaking, a settlement at all. The transaction was a bargain by the husband *with the wife to enable [306
him to perfect the title of the purchaser from him of that estate which was the wife's, and which, by reason of the

(1) 3 T. R., 618.

(*) 1 D. J. & S., 87.

(2) 16 M. & W., 838.

(*) 11 Q. B., 916.

(3) Law Rep., 9 Eq., 510.

deed which purported to convey it not having been acknowledged by her, had never ceased to be her estate. He bought her concurrence in and confirmation of the conveyance, and in exchange for it he agreed to transfer his furniture to a trustee for her. That was no fraud upon his creditors. The fact that he was insolvent at the time did not render him incompetent to purchase the confirmation of his wife, any more than it would have incapacitated him from buying a horse or any other chattel. The subsequent possession of the furniture appears to have been consistent with the terms of the deed. The deed was duly registered under the Bills of Sale Act, and the wife's trustee is entitled to the money which now represents the furniture. The appeal must be allowed, but the transaction is so doubtful I cannot give the appellant his costs.

Solicitors for appellant: *Park Nelson & Morgan.*

Solicitors for Trustee: *Lanfear & Stewart.*

See 10 Eng. Rep., 801 note; 14 Eng. Rep., 418 note.

Where the husband retains sufficient according to all the ordinary vicissitudes of business to pay all his debts, it is ordinarily a question of fact whether a transfer by him to his wife was made with intent to defraud his subsequent creditors or creditors whose rights are expected to shortly supervene, or those whose rights may and do supervene. Though indebtedness to any considerable extent at the time of executing a voluntary conveyance, is *prima facie* evidence that the deed is fraudulent as to creditors, and the *onus* is thrown upon the grantee to prove, in order to repel the fraudulent intent, that the grantor, at the time, was in prosperous circumstances, and possessed of ample means to pay all his debts. Nor is a transfer by husband to wife necessarily fraudulent as to his existing creditors: 1 Sto. Eq., §§ 355-366, 374; 2 Story's Eq. Jur., §§ 1374-7, 1380; 2 Sug. Vend. and Pur. (8th Am. ed.), 443, marg. p., 706; Will. Eq. (Potter's ed.), 227-237; 2 Kent's Com. (12th ed.), 441, note 1.

See cases cited 3 Abb. Dig., 510-511, 516.

Canada, Upper: Equity here seems to regard such transfers with less favor than in the states: *Buckland v. Rose*, 7 Grant's Chy., 440; *King v. Keating*, 12

id., 29; *Mulholland v. Williamson*, 13 id., 91, modified 14 id., 291; *Jackson v. Bowman*, 14 Grant's Chy., 156; *Moore v. Davis*, 16 Grant, 224; *McEdwards v. Ross*, 6 Grant's Chy., 373; *Saunders v. Stull*, 18 Grant's Chy., 590; *Com. Bank v. Cooke*, 9 Grant, 534.

Connecticut: *Hitchcock v. Kiely*, 41 Conn., 611.

England: *Scarf v. Scully*, 1 Hall & Twells, 426, reviewing the English authorities.

Georgia: *Lloyd v. Fulton*, 91 U. S. Rep., 479.

Illinois: *Wooldridge v. Gage*, 63 Ills., 157; *Emerson v. Bemis*, 69 Ills., 537; *Phillips v. North*, 77 Ills., 243; *Patrick v. Patrick*, Id. 555.

Indiana: *Spinner v. Weick*, 50 Ind., 213; *McConnell v. Martin*, 52 Ind., 434.

Iowa: *Lloyd v. Bunce*, 41 Iowa, 660; **Maine:** *Ferguson v. Spear*, 65 Me., 277.

Maryland: *Ellinger v. Crowl*, 17 Md., 361; *Myers v. King*, 42 Md., 66; *Drury v. Briscoe*, Id., 154.

Michigan: *Doak v. Runyan*, 33 Mich., 75.

Mississippi: *Edmonson v. Meacham*, 50 Miss., 84.

Missouri: *Payne v. Stanton*, 59 Mo., 158; *Stivers v. Horne*, 62 Mo., 473.

New Jersey: *Kuhl v. Martin*, 26 N. J. Eq., 60; *Woodruff v. Ritter*, 26 N. J. Eq., 86.

New York: *Holden v. Burnham*, 63 N. Y., 74; *Dybert v. Remerschneider*, 82 N. Y., 629; *Sedgwick v. Place*, 12 Blatchf., 163; *Beecher v. Clark*, 12 Blatchf., 256; *Dunlap v. Hawkins*, 59 N. Y., 342; *Young v. Herrmans*, 8 Weekl. Dig., 204, Court Appeals; *Baker v. Gilman*, 52 Barb., 26; *Fellows v. Emperor*, 18 Barb., 92; *Barnum v. Farthing*, 40 How Prac., 25; *Newman v. Cordell*, 48 Barb., 449.

Ohio: *Oliver v. Moore*, 26 Ohio St., 298.

Oregon: *Bonser v. Miller*, 5 Oregon, 110; *Elfelt v. Hinch*, 5 Oregon, 255.

Tennessee: *Perkins v. Perkins*, 1 Tenn. Chy., 537.

United States: *Smith v. Vodges*, 92 U. S. R., 183; *Jackson v. Jackson*, 91 U. S. R., 122; *Lloyd v. Fulton*, 91 U. S. Rep., 479; *Offert v. King*, 1 Wash. Law Rep., 190, S. C., 1 MacArthur, 312.

Wisconsin: *Hoxie v. Price*, 31 Wisc., 82.

A creditor who is a party to a settlement of property by the husband upon the wife may be estopped from impeaching its invalidity: 2 Sug. Vend. and Pur. (8th Am. ed.), 443 note, 706 marg. p.; *Olliver v. King*, 8 De Gex, Macnaghten & Gordon, 110; *Pell v. Tredwell*, 5 Wend., 661; *Baker v. Gilman*, 52 Barb., 26.

A transfer by husband to wife is to be judged by the circumstances as they exist at the time the same is made: *May on Fraud. Transf.* 267, 1st Eng. edition.

Where the husband has behaved in such a way towards his wife as to entitle her to claim a separation and alimony, he may, if done in good faith, in order to avoid the consequences of a suit, arrange the terms of a separation between himself and wife, and make provision for her maintenance and that of their children. Such an instrument cannot be set aside by the husband's creditors on the ground that it is voluntary and not founded on a valuable consideration: *Hunt on Fraudulent Conv.*, 74 (citing *Hobbs v. Hull*, 1 Cox, 445; *Munn v. Arlsmore*, 8 T. R., 521; *Fitzer v. Fitzer*, 2 Atk., 511; *Wilson v. Wilson*, 14 Sim., 405, 1 H. L. Cas., 538, 5 id., 40; *Van Sittart v. Van Sittart*, 4 K. & J., 63; 2 De Gex & Jones, 249; *Joddrell v. Joddrell*, 9 Beav., 45;

Elworthy v. Bird, Sim. & Stu., 372); 1 Bish. Husb. and Wife, §§ 735, 742, 753-5, 756, 758, 760; *Bump. Fraud Conv.* (1st ed.), 313-4; *Bispham's Eq.*, §§ 114-115, 247; *Kerr on Fraud Conv.*, (1st Am. ed.), 200-205; *Fry's Specif. Perf.*, 507-8, §§ 966-970; *May's Fraud. Trans.* (1st Eng. ed.), 268-294, 591; 1 Pars. Cont. (6th ed.), 360; *Shelf. Mar. and Div.*, 617-625, marg. p., particularly p. 628.

California: *Wells v. Stout*, 9 Cal., 479, 498.

Canada, Upper: *Mason v. Scott*, 20 Grant's Chy., 84; *Adams v. Loomis*, 22 id., 99.

Georgia: See *Baggs v. Baggs*, 54 Geo., 95.

Maine: *Burnett v. Paine*, 63 Maine, 122.

Michigan: *Johnson v. Whittemore*, 27 Mich., 463.

New York: *Youmans v. Boomhower*, 3 Thomp. & Cooke, 21; *Wallace v. Bassett*, 41 Barb., 92; *Sheive v. Kaiser*, 52 Barb., 109; *McCartney v. Welch*, 44 Barb., 271; *Woodworth v. Sweet*, Id. 268; *Tisdale v. Jones*, 38 Barb., 523; *Hunt v. Johnson*, 44 N. Y., 27; *Brace v. Gould*, 1 Thomp. & Cooke, 326; *Shepard v. Shepard*, 7 Johns. Chy., 57; *Simmons v. McElwain*, 26 Barb., 419; *Peck v. Brown*, 2 Rob., 119, 131.

See *Griffin v. Banks*, 37 N. Y., 621.

Pennsylvania: *Hutton v. Ducey*, 3 Penn. St. Rep., 100; *Hitner's Appeal*, 54 Penn. St. R., 110.

United States: *Kehr v. Smith*, 20 Wall., 31. Though clearly not good if largely out of proportion to the debtor's property and his debts: *Kehr v. Smith*, 20 Wall., 31.

A deed by which a husband on articles of separation between him and his wife, binds himself to pay, in trust for her, a certain amount of money (capital), and interest on it till paid, becomes a voluntary settlement if, before payment is made, the parties are reconciled, make null all the covenants of the articles of separation, and cohabit again with an agreement that the settlement shall stand as agreed on, except that the husband shall not pay interest while he and his wife live together.

A voluntary settlement of \$7,000 cannot be sustained against creditors

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when the person owes \$9,806, and has of all sorts of property, the same being net cash, not more than \$16,182: *Kehr v. Smith*, 20 Wall., 81.

See also *Wells v. Stout*, 9 Cal., 479.

A conveyance from husband to wife, in consideration of love and affection, will not be set aside after the divorce of the parties, on the ground that the wife had a husband living at the time of her marriage to the grantor if he had knowledge of that fact at the time of its execution: *Chew v. Chew*, 38 Iowa, 405.

The relinquishment of dower by a wife for the benefit of her husband is a sufficient consideration for a subsequent settlement upon her by him; and such settlement is not fraudulent as to creditors of the husband if the relinquishment was obtained upon a *bona fide* express agreement with her that the settlement should be made, and the property settled upon her as a fair equivalent for the dower released. If the value of the property exceeds the value of the dower relinquished by the wife, the deed will be vacated as to the excess and supported as to the residue: *Burwell v. Lumsden*, 24 Gratt. (Va.), 443; *Nalle v. Lively*, 15 Florida, 130; *Foster v. Foster*, 5 Hun, 557; *Youmans v. Boomhower*, 3 Thomp. & Cooke, 21;

Garlock v. Strong, 3 Paige, 440; *Simar v. Canaday*, 53 N. Y., 298; *Forrest v. Laycock*, 18 Grant's (U. C.) Chy., 611; *Beal v. Storm*, 26 N. J. Eq., 372, 375-6; *Bartlett v. Van Zandt*, 4 Sandf. Chy., 396; *Searing v. Searing*, 9 Paige, 440; *Williams v. Williams*, 3 West. Law Month., 157; *Sykes v. Chadwick*, 18 Wall., 141; *Johnston v. Gill*, 27 Gratt., 587.

Otherwise, if done with intent to defraud creditors: *Black v. Fountain*, 23 Grant's (U. C.) Chy., 174.

Suit was brought on the following note: "For value received, one day after I at any time become intoxicated or drunk, or mistreat or abuse Minnie Myers, I promise to pay to L. M. Phillips the sum of \$600 for the use of Minnie Myers, with ten per cent. interest from maturity until paid." Held: 1. That where a husband and wife do not live together on good terms, and separate, the agreement on the part of the wife to return is a sufficient consideration to support the note. 2. That the note would be valid even without an agreement on the part of the wife: *Phillips v. Myers*, 1 Month. Jur., 110, Sup. Court, Ills.; *Nicholls v. Danvers*, 3 Vern., 671; and see Mr. Raithby's note.

[Law Reports, 1 Chancery Division, 307.]

C.A., Aug. 3; Nov. 3, 5, 25, 1875.

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**In re* EUROPEAN ASSURANCE SOCIETY.

HORT'S CASE.

GRAIN'S CASE.

Insurance Company—Dissolution—Transfer of Liabilities—Unincorporated Company—Power to make Calls—Winding-up Acts.

By the deed of settlement of the A. insurance company it was provided that the funds and property of the company should alone be answerable for claims on the company; provision was also made for enabling the proprietors to dissolve the company, and thereupon the directors were to obtain from some other company an undertaking to pay the claims on the A. company, and were to transfer to that other company a sufficient amount of the assets of the A. company. The A. company was accordingly dissolved, and a portion of its funds was transferred to the B. company, which covenanted to satisfy the liabilities of the A. company. Full notice of this transaction was sent to the policy-holders of the A. company; and in the policies of that company it had been declared that the funds and property of the company should alone be liable to make good the claims under the policy, and the deed of settlement was also referred to. Both companies were wound up, and came under the European Assurance Society Arbitration Acts:

Held, that the A. company had, without the consent of the policy-holders, a right to dissolve itself and transfer its liabilities to the B. company; and that a policy-holder could claim only against the B. company.

Per Mellish, L.J.: On such a policy the holder could not have sued the shareholders separately; nor, after the company was dissolved, would there have been any means of compelling the shareholders to pay calls on their shares, the company being unincorporated, and having been formed before the passing of the Joint Stock Companies Acts and the Winding-up Acts; nor had the passing of those acts affected the rights and liabilities of the parties.

THE Royal Naval, Military, and East India Company Life Assurance Society was formed under a deed of settlement dated the 1st of January, 1839. The company was not a corporation, and the deed was in the then usual form of mutual covenants between the shareholders and certain trustees, as stated in the judgment of the Lord Justice Mellish. The 132d clause of the deed provided for the insertion in every policy and contract of a clause that no director or proprietor of the company should be liable to any claim thereunder, beyond the amount of the unpaid part of his or her share in the subscribed capital, in the company. The 131st clause provided that the funds and property of the company for the time *being unapplied and undis- [308 posed of should alone be answerable for the claims of persons assuring with the company, and of other creditors of the company; that the directors signing policies should be personally liable for the application of the funds and property of the company in discharge of the money secured by the policies, and not otherwise; and that directors and proprietors should not be personally liable beyond the amount of the unpaid part of their respective shares. The 172d clause provided that it should be lawful for an extraordinary court of directors to recommend a dissolution of the company, whereupon extraordinary courts of the company should be called, and if a resolution for dissolving should be entered into at one extraordinary court and confirmed at a second, then the company should be dissolved, and the business concluded. The 173d clause was, "That immediately upon the dissolution of the company, the court of directors shall, out of the funds or property of the company, pay and satisfy all immediate claims and demands on the company arising from assurances, annuities, or other contracts or engagements, and shall (but subject and without prejudice to the provision hereinafter contained), obtain from the directors or managers of some other assurance company or society an undertaking to pay and satisfy all or any such as the court of directors may think proper of the remainder of the claims and demands on the company

arising from assurances, annuities, or other contracts or engagements, when and as the times for the payment and satisfaction of the same shall respectively arrive, and shall cause to be transferred to some of the trustees of such other assurance company or society so much of the funds or property of the company as shall be agreed upon between the contracting parties as sufficient, with the premiums that may become payable in respect of all or any of the existing policies, to enable the company or society from whose directors or managers the undertaking shall have been obtained to comply therewith, and shall make such arrangements with the said directors or managers in regard to the said undertaking as the court of directors shall in their discretion think fit, and shall cause to be done and executed all such acts, deeds, and things as, in the opinion of the court of directors, shall be necessary or advisable for carrying 309] the said arrangement into effect. Provided, *nevertheless, that the court of directors shall be at liberty to continue for such period as they may think fit the business of the company so far as regards all or any of the remainder of the claims and demands on the company arising from assurances, annuities, or other contracts, and the receipt of premiums, and the benefits of any contract with the company And if any funds or property of the company shall remain after answering the several purposes aforesaid, the court of directors shall cause the same, or so much thereof as shall not consist of money, to be sold, got in, or otherwise converted into money, and shall cause the moneys arising from the said remaining funds or property, or of which the same shall consist, to be paid and distributed at such time or times as they shall think fit to and amongst the proprietors and other holders of shares in the capital of the company, according to their respective rights and interests therein; and, notwithstanding the dissolution of the company, these presents and the provisions herein contained, and all powers, privileges, rights, and duties of the proprietors and other holders of shares, including the powers to call and hold extraordinary general courts, and the powers to call for and enforce the payment of further instalments on shares, shall, until all claims and demands shall have been respectively satisfied and provided for as aforesaid, and until a final division shall have been made of the residue, if any, of such moneys as aforesaid, remain and continue in full force, so far as the same may be necessary for winding up the concerns of the company, and for enabling the court of directors to dispose of the funds and

property of the company, and to satisfy and provide for such claims and demands, and to make such payments and disbursements as aforesaid."

On the 11th of December, 1855, Mr. Hort effected with the Royal Naval Society an assurance on his own life for £200. The policy stipulated that, on payment of the premiums as therein mentioned, "the capital, stock, and funds of the society shall, according and subject to the provisions of the deed of settlement of the said society, be liable to pay to the executors, administrators, or assigns of the said assured, within three calendar months after proof satisfactory to the directors of the said society shall have been given of the death of the assured, the sum of *£200." This was [310 subject to a proviso "that the subscribed capital and other the stocks, funds, securities, and properties of the society which at the time of any demand made in respect of this policy may remain unapplied and undisposed of in pursuance of the trusts, powers, and authorities contained in the deed of settlement of the said society, shall alone be liable to make good the claims and demands upon the society in respect of this policy, and that the directors signing this policy shall not be responsible to any greater extent than the funds and property of the society in their hands or power at the time of the claim being made shall be competent to discharge, and that no proprietor shall in any event whatever be liable beyond the amount of the unpaid proportion of his share or shares in the said subscribed capital."

On the 5th of February, 1857, Mr. Hort effected another assurance with the society for £300, the policy being in similar terms.

In August, 1866, negotiations were carried on for the transfer of the business of the Royal Naval Society to the European Assurance Society, and extraordinary courts of proprietors of the Royal Naval Society were duly held, at which resolutions were duly passed approving of the transfer. In the meantime, on the 18th of August, 1866, a circular was sent by the chairman of the Royal Naval Society and was received by Mr. Hort. It stated that the chairman and his colleagues had been anxiously considering whether the interests of the assured and of the proprietors would not be maintained and promoted by the union of the business with that of some larger company, and that they had arrived at the conclusion that such would undoubtedly be the case. That the business of the society was restricted, but was and ever had been in a sound and healthy state, and

would be a valuable accession to any office of greater means. It then proceeded thus: "Under this belief we have entertained overtures from a company of very large business and undoubted security who are willing to take over the society's business and responsibilities under an arrangement which, after adequately securing, as the primary consideration, the society's policy-holders, will give the shareholders a return of their original paid-up capital in 311] cash, or at their *option, in shares of that company, and in the latter case with a considerable bonus. The constitution of all modern companies provides for these advantageous unions or amalgamations, and this proposed arrangement virtually amounts to union or amalgamation with the company referred to. The society's deed of settlement, though not expressly providing for union or amalgamation, does in effect render it practicable by a dissolution of the society; and after due deliberation we have deemed it our duty to call an extraordinary general meeting of the shareholders to take the subject into consideration, as indicated in the annexed notice, and we trust the movement may receive your cordial approval and co-operation."

The arrangement between the companies having been approved of at the courts of proprietors, in order to carry it into effect two indentures were made and executed. By one indenture, dated the 17th of September, 1866, and made between the two companies, after reciting the due holding of the meetings and the passing of the resolutions for dissolving the Royal Naval Society, and that the presumed value of the assets of the Royal Naval Society was agreed to be taken at £98,060, of which £83,951 should be taken as the proportion which, with the premium to become payable, would enable the European Society to pay and satisfy the liabilities and engagements of the Royal Naval Society, and reciting an agreement that such proportion of the property and assets should be transferred to the European Society, it was witnessed that the European Society and its directors covenanted with the trustees of the Royal Naval Society, that the European Society, and the property and assets of the same company, including the assets and property of the Royal Naval Society made over as aforesaid as part thereof, should undertake and be bound by and pay and satisfy all the liabilities on life or annuity policies granted by the Royal Naval Society and on foot on the 6th of August, 1866, and all other debts, liabilities, claims and demands whatsoever, whether present or future, of, upon, or against the Royal Naval Society. And also that the Euro-

pean Society would, out of the property and assets of the European Society, inclusively of the assets of the Royal Naval Society to be made over to them, save harm- [312 less and indemnify, and keep indemnified, the trustees, directors and proprietors of the Royal Naval Society, and every of them and their respective heirs, executors and administrators, and their respective estates and effects, from and against all the said liabilities on life or annuity policies, and other debts, liabilities, claims or demands lastly thereinbefore mentioned.

On the 18th of September, 1866, Mr. Hort received a second circular, signed by the chairman of the Royal Naval Society, with a letter annexed, signed by the manager of the European Society, both addressed to the policy-holders in the Royal Naval Society.

The material parts of the circular were as follows: "Adverting to the circular I addressed to you on the 18th of August last, I have now the satisfaction to inform you that the two extraordinary general courts of the proprietors required by the society's deed of settlement for the purpose, unanimously decided upon a dissolution of the society, and that its dissolution takes place as from the 14th instant. The first duty of the directors was to make, in accordance with the deed of settlement, an arrangement with another company for undertaking the obligation of your policies and securing the interests of the assured, and they have accordingly made such an arrangement with the European Assurance Society, who will in future be the substitute of the Royal Naval, Military and East India Company Life Assurance Society.

"The terms and conditions of your policies remain, of course, unaltered by the arrangement, and although each policy-holder is fully guaranteed for all claims under the present policies by the covenants of the European Society, in the deeds between the two companies carrying out the arrangement, any of the assured desiring it may for greater security either have an indorsement to that effect made on their policies, or may have a policy guaranteeing the existing policy, or a new policy of the European Society.

"All communications should now be addressed, and all premiums paid, to the European Assurance Society, at the office, 17 Waterloo Place, Pall Mall, where the Royal Naval, Military and East India Department will be conducted.

*"Should you, however, have been accustomed to [313] pay your renewal premium through an agent, you will still

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be able to do so, as arrangements will be made by the European Society to continue the agents of the Royal Naval and Military Society."

The letter from the manager of the European Society was to a similar effect.

Mr. Hort sent in his policies to the office of the European Society, and they were returned to him with indorsements in the following form, sealed with the seal of the European Society, and signed by three of its directors, on the 11th of April, 1867:

"Memorandum. It is hereby declared that, subject to the proviso hereunder stated, the funds and property of the European Assurance Society of London, as provided for in the deed of settlement of the said society, shall be liable for the payment of the sum of £200 (without profits) assured by the within policy with the Royal Naval, Military and East India Life Assurance Society of London to the person or persons legally entitled to receive the same. Provided always that the future premiums payable in respect of the said policy be duly paid to the said European Assurance Society at the time and in the manner set forth in the said policy.

"Printed receipts of renewal premiums issued from the chief office will alone be admitted as valid."

The European Society, immediately after the transfer of the business of the Royal Naval Society, removed their business to the offices of the Royal Naval Society. Mr. Hort continued to pay his premiums at the office, and the receipts were given by the European Society, having on them the words "Royal Naval Society Department."

On the 12th of January, 1872, an order was made for winding up the European Society; and on the 1st of March, 1872, an order was made for winding up the Royal Naval Society.

The affairs of both the companies came within the European Assurance Society Arbitration Act, 1872 (35 & 36 Vict. c. cxlv.), and Mr. Hort made a claim in respect of his policies against the Royal Naval Society. His case came before Lord Westbury as arbitrator under the act. Lord 314] Westbury held that Mr. Hort had *not accepted the liability of the European Society instead of that of the Royal Naval Society, and made an order that Mr. Hort was entitled to prove on both his policies against the Royal Naval Society without prejudice to any claim against the European Society.

The official liquidator of the Royal Naval Society ap-

pealed, and the case then came before Mr. Reilly, the arbitrator appointed under the European Assurance Society Act, 1875 (38 & 39 Vict. c. clvii.), who, under the powers of that act, stated a special case for the opinion of the Court of Appeal in Chancery.

The case came on for hearing on the 3d of August, 1875.

Higgins, Q.C., and *Romer*, for the official liquidator: The arrangement between the two companies was within their powers, and the policy-holder might have remained with the Royal Naval Society, but he has accepted the conditions and has had his policy indorsed, so that he cannot now turn round and claim against the Royal Naval Society: *Griffith's Case* (1); *Spencer's Case* (2). He might have objected, but he did not: *Ex parte Blood* (3). The Royal Naval had power to transfer their liabilities, and they did so. Mr. Hort, no doubt, had a charge on the assets, but he could not compel the Royal Naval Society to go on until the sum secured became due: *In re Times Assurance and Guarantee Company* (4). The proof ought to be allowed against the European Society only.

Ince, Q.C., and *Millar*, for Mr. Hort: Our policy is a clear contract with the Royal Naval Society, which gives us a perfect *prima facie* case. The deed of settlement contemplates not that the policy-holders shall be turned over to the new company, but that the trustees of the old company will on its dissolution obtain a guarantee which shall shield the proprietors of the old company, but the liability of the proprietors to the policy-holders remains as it was. The circulars state that the policy-holders will have a further security, and they could not have suspected that they were, instead of getting any further, *to lose all their [315 rights: *In re Manchester and London Life Assurance and Loan Association* (5).

The company must state clearly what they intend, or else the policy-holder is not bound: *In re Family Endowment Society* (6). The adoption of a new firm by a creditor does not absolve the old firm, and both may remain liable: *Devaynes v. Noble* (7); *David v. Ellice* (8).

By the deed of settlement the Royal Naval Society might continue to exist, and the policy-holders might reasonably suppose that it would do so.

Higgins, in reply.

(1) Law Rep., 6 Ch., 374.

(2) *Ibid.*, 362.

(3) Law Rep., 9 Eq., 316.

(4) Law Rep., 5 Ch., 381.

(5) Law Rep., 5 Ch., 640

(6) *Ibid.*, 118.

(7) 1 Mer., 529.

(8) 5 B. & C., 196.

Their Lordships then reserved judgment until they had heard other cases of a similar nature which were to come before them.

GRAIN'S CASE.

Colonel Grain had, in 1861, effected a policy of insurance on his own life with the Royal Naval Society, and the circumstances of his case were similar to those of Mr. Hort's case, except that Colonel Grain had not sent his policy to be indorsed. There was, however, a memorandum, indorsed and signed by the manager of the European Society, that on payment of an additional premium Colonel Grain might go to Jamaica without vitiating his policy.

The claim of Colonel Grain came before Lord Romilly, who decided that Colonel Grain had not accepted the liability of the European Society, and could claim against the Royal Naval Society.

The official liquidator appealed, and the appeal came before Mr. Reilly, who stated a case for the opinion of the Court of Appeal in Chancery. The case came on for argument on the 3d of November, and again on the 5th and 25th of November.

Higgins, Q.C., and *Romer*, for the official liquidator: The deed of settlement is incorporated in the policy, and the policy-holder is bound by its terms. The company must [316] end at *some time, and the mode provided by the deed has been strictly followed. The proprietors are liable only until dissolution. Colonel Grain cannot say that he paid the premiums to the European Society as agents for the Royal Naval Society, for the circulars show it was not so, and at all events the indorsed memorandum is conclusive on that point. The extra premium was paid to the European Society. He had full notice of the transfer and knew what was done.

Jackson, Q.C., and *Millar*, for Colonel Grain: The dissolution of the company was like that of a private partnership, and cannot release the company. *In re Waterloo Life Assurance Company* ⁽¹⁾ has not been approved of. We do not claim against the proprietors but against the company, and the liquidator must make calls or get the money as he thinks fit. The deed of settlement never contemplated insolvency, and the case has not been provided for.

No doubt where there is a provision of this kind a policy-holder cannot, as in *Kearns v. Leaf* ⁽²⁾, obtain an injunction

⁽¹⁾ 33 Beav., 542.

⁽²⁾ 1 H. & M., 681.

to restrain the company from parting with the assets, but that is all. We say that Colonel Grain cannot, *volens volens*, be made a policy-holder in another company, and that he has done nothing to show that he accepted those terms. The European Society were merely agents for the Royal Naval Society, and as such received the regular premiums, and the extra premiums when payable. To whom else could Colonel Grain apply? If the fund transferred had been set aside or ear-marked it might be different, but it was not.

Higgins, in reply.

LORD CAIRNS, L.C.: Before disposing of *Grain's Case* it is necessary to dispose of *Hort's Case*, which was argued at the last sitting, and what is to be said on that case will, to a great extent, if not altogether, govern *Grain's Case*.

Hort's Case was this: [His Lordship then stated the facts of **Hort's Case*, and read the parts of the policy and [317 deed of settlement which bore upon the question:]

The policy which Mr. Hort accepted was, therefore, a policy not merely providing for payment, on his death, of a specific sum of money, but providing that that sum should be paid only by the application of the capital of the company, and that that capital was to be applied according to the provisions of the deed of settlement of the company, whatever those provisions might be.

Now, it may be said that it is an unwise thing for any man to take a contract for the insurance of his life, not making simply some person or some corporation liable to pay the sum insured, but taking as his only security for the payment of the sum, the promise to administer the funds of the company according to the provisions of the deed of the settlement, which very probably the person insured has not taken the trouble to read. And it may be said that it is equally an unwise thing for a person to insure his life with a company and to enter into a contract by which his only remedy is against the capital, or a fund which, according to the deed of settlement, may be handed over to another company, the other company taking the liability of paying on the policies of insurance.

All these things may be said, and with some truth; but there is something to be said on the other side. It is not, after all, very extraordinary that those who are content with insuring their lives, and taking no other security than that which is derived from the character of the directors and the confidence that they will administer the fund in their hands rightly and honestly and wisely, may reasonably say: "If

those directors in whose honesty and wisdom we have confidence think it right, think it more economical or more likely to conduce to the prosperity of the business to hand over their business to another company, to hand over their funds and their obligations on the policies, they are at liberty to do so ; and we, the policy-holders, may be satisfied to be bound by any such arrangement." There may be considerable reason for a policy-holder entering into a contract of that description, and the more so because it is to be observed that unless some arrangement of this kind for the transfer of the business of insurance companies is inserted in their deeds of settlement, there is no practical 318] *mode by which an insurance company can ever come to an end. Other companies may wind up their work and may cease to carry on business, but an insurance company, if some arrangement of this kind cannot validly be made, must go on for an indefinite period of time, or at all events for the period which will be covered by the aggregate lives of all the parties insured.

However, whether the contract be wise or unwise, that is the contract which Mr. Hort entered into ; a contract which, as I read it, contains a power given to those who contracted with him, in the due execution of their duty, provided they do so honestly and *bona fide*, to make over their funds to any other society which will take upon itself the obligation of paying on the policies which have been effected.

Now, what was done in this case ? The Royal Naval Society agreed to make over their business to the European Society, and in pursuance of that agreement a deed of arrangement, dated the 17th of September, 1866, was executed. [His Lordship then read the parts of the deed which have been hereinbefore stated.] Therefore there is an arrangement which has followed literally and properly the provisions of the deed of settlement of the Royal Naval Society. The Royal Naval Society have obtained a company to stand in their place, and to take on themselves the liabilities on the policies. The Royal Naval Society and the European Society have made an estimate of the sum adequate to provide for those liabilities, and that sum out of the assets of the Royal Naval Society has been handed over to the European Society ; the remainder of the property of the Royal Naval Society has been divided, and the company has been dissolved as far as it could properly be so, and has ceased to carry on any business. There is no imputation on the good faith of that arrangement. It is not suggested that it was done unfairly or improperly to get rid of their

liabilities; it was done openly; not in a corner, but openly announced. Meetings were openly held, and the parties professed to follow, and evidently thought they were following to the letter, the deed of settlement under which they were acting.

That being the course which the companies took as between themselves, we now turn to the communications which they made to the policy-holders. And before reading them, I may point out *that if this, which was [319 done by the company, was *intra vires*, and was warranted by the contract of insurance which Mr. Hort entered into, this case is not, in any respect, a case of what has been termed "novation"—it is a case of a different kind—a case which simply raises the question whether that which was done by the Royal Naval Society was what they were authorized and empowered to do as a matter of right, and whether Mr. Hort was bound to submit to it when done? If he was bound, then even if he refused to submit, his refusal would have been vain. Still more if he has acquiesced, and the deeds of arrangement and transfer have been actually carried into effect.

On the 18th of August, 1866, this circular was sent from the Royal Naval to Mr. Hort.

[His Lordship then read the terms above stated, and observed that nothing could be more frank than the way in which the circular appealed to the deed of settlement of the Royal Naval Society as the authority for what was being done. His Lordship then read part of the circular of the 18th of September, 1866, and said that he did not look on this as the proposal of three alternatives, but as saying that the policy-holder might please himself as to the form, but the result would be the same, and be the result contemplated by the deed of settlement. His Lordship then read the indorsement on the policies.]

That indorsement appears to carry the matter no further than if it had not been made. It merely makes the funds of the European Society liable, which they clearly were by the contract between that society and the Royal Naval Society.

It appears to me, without looking to the terms of the receipts which were subsequently given by the European Society, that this has proved to be a very plain case. Mr. Hort's original contract was not that in all events and under all circumstances he would have a claim against the Royal Naval Society, but was a contract in its nature open to the chance of shifting. If pursuing the course laid down by the

deed, by which he was content to be bound, the Royal Naval Society entered into an engagement to dissolve, and handed over sufficient property to another company, and took the undertaking of the other company to provide for their liabilities, they were at liberty to make over to 320] *the other company, and upon those terms, the funds against which alone Mr. Hort had a claim. Upon that footing they informed Mr. Hort that they had acted, and thus directed him to pay the premiums to the new company. He had clear notice of what was being done, and I am of opinion that he could not have objected. But he did not object; he acted on the directions, and paid the premiums accordingly. In my opinion, therefore, he is a creditor of the European Society, and not of the Royal Naval Society.

JAMES, L.J.: I am of the same opinion. At the time when the Royal Naval Society accepted the proposal of Mr. Hort, and granted him a policy, there was no general mode by which these companies could be incorporated. They were an unincorporated body of persons, but although they were in point of law and in point of fact not absolutely a corporation, it is quite clear that, as between all the parties to these deeds of settlement, it was their intention to make themselves for all practical purposes as like a corporation as in the then state of the law was possible to be done by a mere contract. It was intended that they should not be a partnership of the particular individuals existing at that time, but that they should be a body of persons with continuous and perpetual succession (until dissolved according to the terms of the constitution of their own body) as between themselves, and as between them and all persons having dealings and transactions with them. The same principle was the basis of all the arrangements. Nobody effecting a policy of insurance with such a society as this ever intended to be left, or ever thought he was left, or that his executors would be left after his death, to the necessity of bringing an action against the survivors of the individuals who happened to constitute the particular body of persons on the day on which his policy was signed. The intention was that it should be a bargain with a *quasi* corporation, and a liability against the *quasi* corporation and against the persons who at the time when the policy ripened into a *debitum* would be the persons to provide for it.

Another consideration is not immaterial in this matter—that is, that these contracts are contracts for life assurance, and that every life assurance society—there may be others 321] as well—but *every life assurance society is substan-

tially and materially a mutual life assurance society. The method by which it is intended to provide for payment of the sums secured by the policies is by investing the premiums and accumulating the money so as to form a fund out of which the claims are ultimately to be satisfied. The capital of the shareholders, and the sums which the shareholders undertake and make themselves liable to pay, are in truth only a guarantee against the possible contingency of the accumulated insurance fund being insufficient.

That being the state of things, if in any such office a sufficient amount of business is not obtained to begin with, or if the business falls off, so that the assets and the probable future income of the society will not be sufficient to provide amply for all the liabilities which it has entered into and is entering into, the honest and proper course is to get some larger, stronger, and more prosperous society to accept the liabilities of the unprosperous society which, out of its assets, would pay a sufficient sum to induce the more prosperous society so to do. In fact, this court has, in more than one instance, done this very thing in winding up an insurance company, and has in other instances sanctioned such a bargain when incomplete. In truth, to do otherwise would be to commit a fraud on the younger lives, who would be left in the same position in which a great number of poor persons are often left in connection with friendly societies where their rates have been insufficient and the funds are exhausted in paying to the older members, so that the younger members are left unprovided for. Therefore it is not that there is anything wrong in the provisions, because it was a reasonable and proper provision to make for the safety, not only of the shareholders, but of the persons insured.

When, with these considerations, we come to the construction of the deed, it appears to me that if we do not feel ourselves compelled to put a strained construction against the shareholders, and in favor, as it would ultimately be, of the policy-holders—if we do not feel constrained to do otherwise than put the ordinary construction upon the deed—I agree with the Lord Chancellor that, beyond doubt, the construction of the deed is, that the policy authorized the society to transfer its business, including all its *liabili- [322 ties, to the other society, and that in this case that transfer was duly effected. It seems to me that there really is nothing more unreasonable in the whole body of shareholders transferring their liabilities to another whole body of shareholders than there is in a shareholder, or every shareholder

one after another, going out of the society and transferring his shares to a new shareholder, who will not be the person with whom the policy-holder effected his security.

I entirely agree with the Lord Chancellor that it is a question of the construction of the deed. Possibly the deeds were not sufficiently considered in some former cases in which the thing was treated too much as a mere question of "novation," a word which was unfortunately introduced into these cases, and which has led to a considerable amount of expense, which must fall upon some of those who are concerned.

MELLISH, L.J.: I also have come to the conclusion that, according to the true construction of the deed, the Royal Naval Society had a right, without the consent of the policy-holders, to transfer to a proper company the entire assets of the Royal Naval Society; and after they had done so, and had obtained from the new company a proper covenant making the new company liable on the policies, then the members of the old company were discharged.

Now it is necessary, as has been said already, to look carefully at the exact terms of this policy, and the exact terms of the deed of settlement, and at the position of the policy-holder. The capital, stock, and funds are alone to be liable, and no proprietor is to be liable beyond the amount of his shares in that capital stock. It was held by the Exchequer Chamber, in the case of *Hallett v. Dowdall* (¹), that under a clause of that description no action at law could be maintained against the shareholders jointly, because the provision that each proprietor was only to be liable to the extent of his own share in the capital stock was inconsistent with the joint liability at law. One or two of the judges in that case who were in the majority did throw out an opinion 323] that *possibly a separate action might have been maintained against each proprietor, but I think that, on carefully studying the case, it will appear that the majority of the judges were not of that opinion. I am of opinion that a separate action at law could not have been maintained against each proprietor, and for this reason—If a separate action could be maintained against each, the proprietors to be sued would have been not the persons who were proprietors at the time when the death occurred and the policy became payable, but the persons who were proprietors at the time when the policies were effected. Nothing can be clearer than the clause respecting the transfer of shares. It is said in the plainest terms that when the transfer is effected, the

(¹) 18 Q. B., 2.

transferring person is to be absolutely released and discharged from all liability, and yet if they were liable separately the transfer would be no answer in a court of law, and he would be liable to be sued.

I am of opinion, therefore, that no action could be maintained, and if that is so the only remedy is in equity. Now what was the remedy in equity? It must be remembered that at that time no Winding-up Act had passed, and there was no Joint Stock Companies Acts and no other act relating to this society, and, beyond all question, a court of equity could not have interfered with the assets which, according to the terms of the deed, had been transferred to the European Society.

Then it is said that the creditors could have reached the unpaid shares of the proprietors. But how could they have done so? They themselves could not have made calls on these proprietors. Before the passing of the Winding-up Acts and the Joint Stock Companies Acts, a court of equity had no power to make calls on the shareholders. All that it could have done would be to compel the directors to make calls, and the directors must have made them in accordance with the provisions of the deed of settlement. And it will be found that the only mode in which the calls could be made would be by bringing an action at law on his covenant against each proprietor who executed the deed, or each proprietor who had taken a transfer on the covenant that he would perform the duties of a proprietor. In the deed of settlement every person party to the deed covenants with five trustees, and these five trustees covenant with other persons to observe all the terms of *the deed. There [324 is also a provision that every transferee of a share is to execute a covenant that he will perform all the duties of a proprietor. That being so, all that a court of equity could do would be to order actions to be brought on those covenants. Then the question arises, whether an action could be maintained against each of these proprietors years after the dissolution, and years after all the affairs of the society had been wound up. That question could be raised only between the persons who had been shareholders and the covenantees who were bringing that action, and it appears to me, from the terms of the 173d clause of the deed, that such an action could not have been maintained. It contains an express provision that, notwithstanding the dissolution, they are to transfer to the other company such policies or liabilities as they please; but they may keep other policies or liabilities, and not wind up immediately; and then it

goes on to say that there shall be power for the general meetings and for the courts to call for and enforce payment of further instalments until all claims shall have been respectively satisfied and provided for. I think there cannot be a doubt that "satisfied" means until those claims which have become payable have been paid, and that "provided for" means until those claims which are to be provided for by getting another company to covenant have been thus provided for. Until all that has taken place calls may be made to assist the winding-up, but it is plainly implied that when the winding-up is over, and when the surplus, supposing there is one, has been divided among the shareholders for the time being, no further calls are to be made. It is absurd to suppose that after the affairs of the company are wound up, and after the shareholders who do not choose to come into the new company have received their shares of the assets after the winding-up, and the company is dissolved, any further call should be made.

I am, therefore, of opinion that, according to the true construction of the deed, treating it as a strict matter of law, there would be an answer to an action on the covenant, and that there would have been no breach of covenant in refusing to pay up an instalment, even supposing that any directors could be found to make a call. It seems to me that a court of equity would have had no means of compelling the 325] proprietors to pay. That being so, *the subsequent act enabling calls to be made by the court cannot make people liable who would not have been liable if no such act had been passed.

LORD CAIRNS, L.C.: The costs will be provided for out of such funds as the arbitrators shall direct, as in the other cases.

GRAIN'S CASE.

LORD CAIRNS, L.C.: The observations which have been made in reference to *Hort's Case* will really cover *Grain's Case*, which, up to a certain point, is exactly the same as *Hort's Case*. There is this peculiarity, that Colonel Grain, having occasion to go on service to the West Indies after the European Society had taken the business of the Royal Naval Society, made an arrangement with the European Society by which, for a higher premium, he received permission to go to the destination for which he was setting out. If what we have said in *Hort's Case* did not cover *Grain's Case*, it might have become necessary to consider what the effect of that special contract made with the Euro-

pean would have been. It is unnecessary however, to consider that question, because what we have said in *Hort's Case* will cover *Grain's Case*, and shows that he also can rank as a creditor only against the European Society. His costs, as well as the costs of all parties, will be provided for by the arbitrator.

Solicitors for the official liquidator: *Mercer & Mercer*.

Solicitor for Mr. Hort: *T. Donnithorne*.

Solicitors for Colonel Grain: *Wood, Street & Hayter*.

[Law Reports, 1 Chancery Division, 846.]

C.A., Nov. 10, 1875.

*OLIVANT V. WRIGHT.

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[1875 O. 18.]

Will—Construction—Tenant for Life—"Die without Issue"—Period of Division.

A testatrix devised and Bequeathed her separate estate to her husband for life, and after his death to be divided amongst her five children, and if any of her children should die without issue, that then that child's share should be divided among the children then living; but if any child should die leaving issue, that issue should take its parent's share. The five children of the testatrix all survived the tenant for life:

Held (reversing the decision of Bacon, V.C.), that the estate was, at the death of the tenant for life, to be divided between the five children absolutely.

O'Mahoney v. Burdett ⁽¹⁾ and *Ingram v. Soutten* ⁽²⁾ distinguished.

ANN, wife of James Nicholson, being possessed of separate estate, real and personal, made her will, dated the 29th of November, 1844, containing the words following:

"I give and bequeath unto my husband, James Nicholson, all my real and personal property, whether houses, land, or whatever else I am entitled to from my late aunt's estate, and all other effects belonging to me, wheresoever they may be at the time of my decease, during his natural life to receive all the rents, *interest, and profits arising from [347 them, for his own use; and after his decease to be divided amongst my five children, share and share alike; and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die leaving issue, then that child (if only one) should take its parent's share, and if more than one, to be divided equally amongst them, share and share alike."

The testatrix died on the 31st of August, 1846, leaving her husband and the five children her surviving.

Her husband, the tenant for life, died in March, 1857.

⁽¹⁾ 12 Eng. Rep., 22.

⁽²⁾ 12 Eng. Rep., 40.

Richard Nicholson, one of the five children, died in August, 1874, having had one son, James Nicholson, who died in July, 1866. Ann Parkinson, another child, had died in 1868, leaving four children her surviving.

The Vice-Chancellor Bacon, in construing this will, had decided that the interests of the children of the testatrix, on their deaths leaving issue, went to their respective children living at their deaths; and that the share of Richard Nicholson devolved upon the three surviving children, as reported (').

Sarah Nicholson, widow of Richard Nicholson, and his devisee and general legatee, appealed.

Swanston, Q.C., and *A. T. Watson*, for the appellant: We say that Richard Nicholson, as a child who survived the tenant for life, took a fifth absolutely. The question is whether the words "die without issue" and "die leaving issue" refer to death at any time, or to death before the period of division, and we say to death before the period of division. There are in this will expressions which prevent the cases of *O Mahoney v. Burdett* (') and *Ingram v. Soutten* (') from applying.

[They also referred to *Treharne v. Layton* (').]

Hastings, Q.C., and *Everitt*, for the children of Mrs. Parkinson: The construction contended for on the other side cannot be given without inserting after the word "die," 348] the words "in the *lifetime of James Nicholson." No doubt there is a direction to divide, but that is not conclusive, or else many of the cases on similar words would not have arisen: *Gosling v. Townshend* ('); *Bowers v. Bowers* (').

Ince, Q.C., and *North*, for other parties.

JAMES, L.J.: The Vice-Chancellor has, it appears to me, laid down accurately the rule that where there is a gift over in the event of death without issue, that direction must be held to mean death without issue at any time, unless a contrary intention appears in the will; and that the introduction of a previous life estate does not alter that principle of construction. That rule was so laid down by the House of Lords in dealing with the case of *O Mahoney v. Burdett* ('), and in dealing with the case of *Ingram v. Soutten* ('), where the Lord Justice and myself had thought that we ought to follow as a general rule the 4th canon of construction in the

(1) Law Rep., 20 Eq., 220.

(2) Law Rep., 7 H. L., 388.

(3) Law Rep., 7 H. L., 408.

(4) Law Rep., 10 Q.B., 459.

(5) 17 Beav., 245.

(6) Law Rep., 5 Ch., 244.

case of *Edwards v. Edwards* (¹), and had laid down that the introduction of a previous life estate altered the *onus probandi*, and raised a presumption that the death referred to was to be considered as a death in the lifetime of the tenant for life, unless a contrary intention appeared in the will. But the House of Lords appears to be of opinion that the rule was, in *Edwards v. Edwards*, laid down in terms too general, and that a gift over in the event of death without issue was to be construed in the same way, whether there was a tenancy for life or not.

In every case these rules must be governed by the qualification which the Vice-Chancellor has introduced in this case, that is to say, unless a contrary intention appears in the will. Now, applying that qualification to this particular will, it seems to me, with all deference to the Vice-Chancellor, that a contrary intention does appear almost in express words. [His Lordship then read the will.] What is the meaning of the words "and after his decease?" Can there be any doubt that "after his *decease" means [349 the time when the estate for life comes to an end, and when the property is to be divided? I do not think it material to consider whether this is real or personal estate; but a consideration does arise that this is a gift of both real and personal estate, which must be absolutely divided between the children; and the will goes on further to say how the division is to be in the event of there not being five children then living to receive their shares. The will says "if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living." The natural meaning of the word "then" would be the time of the division, which was before spoken of as to be made at the death of the tenant for life; and according to the plain and natural meaning of the words, this can only mean that immediately after his decease the executors and the trustees are to see that her property is actually divided among her five children. In my opinion there is throughout this will only one period of division contemplated.

The whole scheme of the will seems to be as plain and reasonable as any scheme of a will can be. There is to be a division at the death of the tenant for life, and every event which can occur at the death of the tenant for life has been provided for. All is consistent with the intention that there is then to be a final division. Any other construction would lead to so many absurdities and contradictions, that

(¹) 15 Beav., 357.

I cannot bring myself to entertain any doubt whatever as to what the intention of the testatrix was. It is the duty of a court of construction to give effect to that which appears to the court to be the plain intent of the words used.

I am, therefore, of opinion that the Vice-Chancellor did not make a correct application of the rule he himself laid down as applied to this particular will.

MELLISH, L.J. : I am of the same opinion. I think it is quite clear that by the word "divided" the testatrix meant that the executors were actually to divide the property, and that the *corpus* of the property, real and personal, was to be actually handed over and given to the children or their 350] issue, as the case might be. That seems to me *to be made quite clear by the difference in the description as to how the property is to be enjoyed during the lifetime of the tenant for life, and how it is to be enjoyed afterwards. The tenant for life is only to receive the rents, interest and profits, and is not to have the *corpus* ; but after his decease it is to be divided among the five children. If when the executors come to the division they find one of the children is dead, and is dead without leaving issue, they are to divide his share among the other children who are then alive, but if any of the children have died leaving issue, then that issue will take the parent's share. All appears to me to point to one period of division, whereas, according to the argument on the other side, there might be several periods of division ; and what is to happen if all the five children, one after the other, die without leaving issue, does not exactly appear.

Following the rule of the House of Lords, it does appear clearly in this case, that there are contrary intentions expressed in the will, which show that "dying without leaving issue" was not intended to refer to the time of death of the person who dies, but the time of death of the tenant for life.

BRAMWELL, B. : I am of the same opinion. I have only this additional observation to make, that if the construction put upon the will by the respondent is right, the consequence follows, which, as I understand it, the Vice-Chancellor held did follow, that the surviving children take the shares of the child dying without issue, to the exclusion of the issue of the child who died with issue, which certainly is unreasonable. Another consequence which follows, as I understand, is that a child may die leaving issue, living the tenant for life, and though that issue may die, living the tenant for life, he is still entitled to the share, which also seems unreasonable. That is to say, a grandchild dying

during the life of the tenant for life would take that which a child dying during the life of the tenant for life would not take.

BRETT, J.: I am of the same opinion. I agree that the Vice-Chancellor has laid down a proper rule, but has misapplied that rule to this *will. The question here is, [351 whether there is a contrary intention apparent on the face of the will. Now, it seems to me that there is an express direction to divide at a particular time—the death of the tenant for life—not restricted or modified by any other express stipulation or intimation of a contrary intention. Here it is obvious, upon consideration of the absurdity of what would happen under any other construction, that the meaning of the words “after his decease” is “at the time of the decease.” It appears to me that the general rule does not prevail, as a contrary intention appears on the face of the will; and the construction of the Vice-Chancellor on this will is therefore wrong.

MINUTES: Declare that the order of the Vice-Chancellor be varied by making a declaration that under the will of Ann Nicholson, Richard Nicholson, as surviving James Nicholson, took an absolute interest in one-fifth share of the estate devised and bequeathed by the will of Ann Nicholson, and that Sarah Nicholson, as representing him, is entitled thereto. Costs of the appeal by arrangement to be costs in the cause.

Solicitors: *Miller & Wiggins; Johnston.*

[Law Reports, 1 Chancery Division, 862.]

C.A., Nov. 26; Dec. 1, 2, 1875.

*WIMBLEDON AND PUTNEY COMMONS CONSERVATORS V. DIXON. [362]

[1875 W. 90.]

Right of Way—Road for all Purposes—Change in the Use of Dominant Tenement.

The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farm house and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm:

Held (affirming the decision of Jessel, M.R.), that that did not establish a right of way for carting the materials required for building a number of new houses on the land.

Seemle, the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way between that point and the gate.

THIS was an appeal by the defendant from a decree of the Master of the Rolls granting a perpetual injunction.

1875

Wimbledon and Putney Commons Conservators v. Dixon.

C.A.

By the Wimbledon and Putney Commons Act, 1871, the fee simple of Wimbledon Common, including the roads hereinafter mentioned, became vested in the plaintiffs. Up to that time, it had been vested in Earl Spencer, as lord of the manors of Wimbledon and Battersea and Wandsworth, or one of them.

Adjoining the south side of the common was an ancient earthwork known as Cæsar's Camp, inclosing about fifteen acres. On the eastern side of Cæsar's Camp were three messuages built in or soon after the year 1867, and adjoining the south side of the common. Access to these houses was obtained from the east by a road called the New Road, which ran westwardly over the common near its southern boundary, from a public road called Workhouse Lane, and by two short roads running southwards out of the New Road to the entrance gates of the messuages, these short 363] roads *being nearly at right angles to the New Road. The most westerly of these two cross-roads was at the western end of the New Road, and at a distance of about sixty yards from Cæsar's Camp.

Cæsar's Camp, the sites of the above three messuages, and the farm and lands on the southerly and westerly sides of them, known as Warren Farm, Shadwell Wood, and Warren Cottage, were the property of Mr. Drax, and Cæsar's Camp formed part of the farm. Before 1867, access for horses and carriages to these lands was obtained by an old private road running from Workhouse Lane to a cottage, called Camp Cottage, adjoining the north-east corner of the most easterly of the above three messuages, and by several old tracks over the common, leading from the end of the road near Camp Cottage, to a gate which formed the eastern entrance to Cæsar's Camp. This user was admitted to have been immemorial.

In 1867 Mr. Drax let to the defendant the site of the three above-mentioned messuages. The defendant negotiated with Earl Spencer for a right of way to them. No grant of a right of way was ever made, but Earl Spencer made the New Road and the two cross-roads at his own expense, making a complete road up to the most westerly of the cross-roads. There was some conflict of testimony as to whether the New Road was carried completely to the gate of the camp, but the result appeared to be that a finished road was made up to the cross-road, and that from that point to the gate little was done, but that something like a road existed. It appeared that up to Camp Cottage the New Road was nearly identical with the old private road

mentioned above. Until the passing of the act the defendant paid Earl Spencer £10 a year for the use of the roads.

In 1872 the defendant became tenant to Mr. Drax of part of Cæsar's Camp and some adjoining land, and made preparations for building a house within the camp. The plaintiffs thereupon gave him notice that they recognized no right of access to the camp over Wimbledon Common, except along the existing road or track to the gate of the camp for the purposes of agricultural occupation only. The defendant replied, asserting his right to use the roads for access to any houses he might build, but did not proceed any further till 1875, when he commenced building operations. The plaintiffs *thereupon filed their bill, praying that the defendant might be restrained from drawing along the New Road leading from Workhouse Lane to the entrance to Cæsar's Camp, or any part of it, any building materials for the erection of houses or other buildings on Cæsar's Camp, or on any part of Warren Farm, and from otherwise using the New Road as a means of access to the camp and lands in excess of the user to which it was liable as a road made in substitution for the ancient tracks across the common. [364

It was not disputed by the plaintiffs that the occupier of Warren Farm and the other lands mentioned above had from time immemorial enjoyed the right of using the way for all ordinary agricultural purposes connected with the farm and adjoining land. Cæsar's Camp was much resorted to by visitors, who, when they wished to enter it in a carriage, used to send for the key of the gate, which was kept on the farm, the gate usually being locked. The defendant, however, claimed a right of way for all purposes, and in proof of the road having been used by the occupiers of the farm for all purposes, he adduced evidence to the following effect: That about thirty years ago, when a wing was added to the farm house and a new stable built, the materials were carted along the road through the gate into Cæsar's Camp and thence to the farm; that about the year 1855 buildings were being erected on Wimbledon Hill, and that for several weeks large quantities of sand and gravel were dug out of the ground which afterwards was the site of the above-mentioned three messuages, and carted along the road past Camp Cottage and through the gate into the camp and thence to Wimbledon Hill; and that about the year 1859 Warren Cottage was altered from a clay tenement into a brick-built cottage, and the materials carted to it by the same way; and that the road was used by persons having

the right of shooting on the farm. There was also some evidence as to another cottage having been built on the farm and the materials brought along the new road.

The Master of the Rolls granted a perpetual injunction restraining the defendant from drawing, or causing to be drawn, along the New Road leading from Workhouse Lane to or towards the entrance to Cæsar's Camp, or along any part of the said New Road, any bricks, stone, or other [365] building materials to be used in the *erection of houses or other buildings, other than ordinary farm buildings, upon Cæsar's Camp, or any part thereof, or upon any of the lands then or then lately forming part of the Warren Farm, and in which the defendant claimed to be entitled under his agreement with Mr. Drax, except for the ordinary farming purposes of the said camp and lands respectively; and from otherwise using the said New Road as a means of access to the said camp and lands in excess of the user to which it was liable as a road made in substitution for ancient tracks across Wimbledon Common. The defendant appealed.

Miller, Q.C., and Bush, for the appellant: The injury to the plaintiffs is too slight to make a case for an injunction.

[MELLISH, L.J.: But must we not determine whether you have the right you claim?]

We have enjoyed a right of way from time immemorial, and it has been used for all purposes for which we had occasion to use it. A right of way for all purposes across a common may be established by slighter evidence than across a private field. *Cowling v. Higginson*⁽¹⁾ and *Dare v. Heathcote*⁽²⁾ show that a user for all purposes for which the owner has required to use the land, shows a general right of way for all purposes. The case of *United Land Company v. Great Eastern Railway Company*⁽³⁾ supports our case. The *quantum* of inconvenience is the test: *Gale on Easements*⁽⁴⁾; and to the owner of a common there is no sensible inconvenience in a right of way for all purposes. The grant, therefore, which is presumed from immemorial user is to be supposed a general one. The Wimbledon Common Act (34 & 35 Vict. c. cciv.), s. 107, helps us, the words being "enjoyed and used" without saying "entitled."

[MELLISH, L.J.: That is only a saving clause.

BRAMWELL, B.: You wish to turn "shall not prejudicially affect" into "shall beneficially affect."]

(1) 4 M. & W., 245.

(2) 25 L. J. (Ex.), 245.

(3) Law Rep., 10 Ch., 586.

(4) Ed. 1868, p. 330.

**Chitty*, Q.C., and *W. R. Fisher*, for the plaintiffs: [366 We admit a right of way for farm purposes, and that we have never disputed. The *onus* lies on the defendant to show that he is entitled to anything more.

[MELLISH, L.J.: The case you have to meet is that the road has been used for every purpose for which the owners of the dominant tenement wanted it, which Parke, B., in *Cowling v. Higginson* (1), appears to consider sufficient evidence of a general right of way.]

Williams v. James (2) lays down the rule applicable to the case. User is evidence only of a right to use the way for all purposes reasonably incident to the property as it stood, not to the property when artificially altered into something quite different. *Cowling v. Higginson* was cited in that case. In *Allan v. Gomme* (3) the rule seems to have been laid down somewhat too strictly as to the dominant tenement remaining exactly in the same condition, and probably Parke, B., only meant to object to this. In that case (4) *Jackson v. Stacey* (5) was cited with approbation. *Skull v. Glenister* (6) affirms the same rule.

[JAMES, L.J., referred to *Henning v. Burnett* (7).]

A reasonable amount of variation in the use of the dominant tenement is allowed, but the burden must not be substantially increased: *Baxendale v. McMurray* (8). In *Dare v. Heathcote* (9) it might well be found that changing the farm from an ordinary farm to a cattle farm was only a reasonable change of the use of the property in its existing state.

Miller, in reply.

JAMES, L.J.: I am of opinion that, subject to a slight alteration in the words of the injunction, the order of the Master of the Rolls ought to be affirmed.

*The question between the parties is whether Mr. [367 Dixon is entitled to convert a piece of land forming part of an estate or farm called Warren Farm, and hitherto uncultivated, into sites for several houses, and to use, for the purpose of bringing materials for their erection, and for all purposes connected with the houses when built, a right of way which the owners and occupiers of the farm have from time immemorial enjoyed over land of the plaintiffs. The right which Mr. Dixon claims under his landlord, Mr. Drax, is an unlimited right of way for all purposes over

(1) 4 M. & W., 245.

(2) Law Rep., 2 C. P., 577.

(3) 11 A. & E., 759.

(4) Page 771.

(5) Holt, N. P., 455.

(6) 16 C. B. (N.S.), 81.

(7) 8 Ex., 187, 194.

(8) Law Rep., 2 Ch., 790.

(9) 25 L. J. (Ex.), 245.

the plaintiffs' land to and from every portion of the land constituting the Warren Farm, after the whole of the farm has been laid out for building purposes and turned into a town, if he should be minded and able so to convert it. As far as we have any evidence before us, the farm in respect of which this right is claimed has been substantially in its present state from time immemorial, during which it is to be assumed that the right of way has been exercised, that is to say, there were a farm house, farm lands, and a piece of woodland. The only alterations of which we have any evidence in the state of the property, have been an enlargement of the farm house to a small extent, the change of a mud cottage into a brick cottage, and probably the erection of another cottage—whether an erection or change I am not quite sure. But those are the only changes which are alleged to have taken place in the property. Now, that those changes may be material, and may be to some extent evidence of such a general right as is claimed, it is probably difficult to deny; but whether they amount to evidence sufficient to justify the inference of fact that such a right existed, is another question. I am of opinion that the mere fact that over a common some building materials were taken for the purposes I have mentioned, is not sufficient to justify the inference of fact that the right of way belonging to the house and property was to be an unlimited right of going to and from the land for all purposes, to whatever purposes the land might be applied. The way has also been used for ordinary agricultural purposes—for sporting, which seems to me the same thing as an agricultural purpose, and for taking gravel from a gravel pit in one of the fields. That is insufficient, as it seems to me, to enable us to draw the inference of fact that the extended right claimed 368] by Mr. Dixon ever existed. *The evidence practically comes to this, that the right of way has been exercised for all purposes connected with the use of the farm for residential or agricultural purposes.

We have then to consider whether the character of the property can be so changed as substantially to increase or alter the burden upon the servient tenement. I said when this case was first opened, that I was strongly of opinion that it was the settled law of this country that no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. The *dicta* and observations, which are entitled to very great weight, of Lord Abinger and Mr. Baron Parke in the cases which have been referred to, inclined me at first

to think that the opinion I had formed was wrong. But when we consider those remarks in connection with the very clear language of the Court of Queen's Bench in *Allan v. Gomme*⁽¹⁾, and of the Lord Chief Justice Bovill and Mr. Justice Willes, in the case of *Williams v. James*⁽²⁾, I am satisfied that the true principle is the principle laid down in these cases, that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, *quâ* field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes of the manufactory or town so built. I therefore think that the Master of the Rolls was right in the result at which he arrived.

But I think it right to say, as the judgment of the Master of the Rolls has been read to us, that I am unable to agree with the view which apparently he formed, that there could be no right of way at all in respect of what are called the tracks over the common. I am not at all prepared to assent to that as a true statement of the law of this country. If from one terminus to another, say from the gate here to the end of a road 200 yards off, persons have found their way from time immemorial across a common, although sometimes going by one track and sometimes by another, I am not prepared to say that a right of road across the common *from one terminus to the other may not be [369 validly claimed, and may not be as good as a right over any formed road, but I fully concur in all that the Master of the Rolls has said as to there being no right to use the way further than for all purposes according to the ordinary and reasonable use of the land in the state in which it formerly was. It probably, however, would be better that the words in the order, "except for the ordinary farming purposes of the said camp and lands respectively," should be altered into some such expression as "except for the purposes to which the land has been heretofore applied."

MELLISH, L.J.: I am of the same opinion. The question is whether Mr. Drax and his tenants are entitled to use this right of way for the purpose of turning the land into building land, for erecting new buildings upon it, and then, after the buildings are erected, for the purposes of those build-

(1) 11 A. & E., 759.

(2) Law Rep., 2 C. P., 577.

ings. It is admitted in the bill, and proved in point of fact, that the right of way did exist for some purposes, and I do not, any more than the Lord Justice, agree with what was thrown out by the Master of the Rolls as to the consequence of the track not being a perfectly definite track over the common, but being a track going in varying lines previously to the time when the new road was made. No doubt if a person has land bordering on a common, and it is proved that he went on the common at any place where his land might happen to adjoin it, sometimes in one place and sometimes in another, and then went over the common sometimes to one place and sometimes to another, it would be difficult from that to infer any right of way. But if you can find the terminus *a quo* and the terminus *ad quem*, the mere fact that the owner does not go precisely in the same track for the purpose of going from one place to the other, would not enable the owner of the servient tenement to dispute the right of road. Suppose the owner of this common had granted by deed to Mr. Dixon the right to go from the gate leading out of Cæsar's Camp to the highway by the National School with carriages and horses at his free will and pleasure, I cannot suppose that the grant would fail in point of law, because it did not point out the precise definite track between the one terminus and the other in which he was to go in using the right of way. If the owner of the servient tenement does not point out the line of way, then the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough, and there are ruts in it, and so forth. In my opinion the bill has properly admitted that the defendant has a right of way for some purposes.

Then comes the question, what is the extent of that right of way? That depends partly on a question of law and partly on a question of fact, but mainly on a question of law. When the question of law is settled there is no great difficulty in arriving at a proper conclusion in point of fact. The question of law is this: Assuming that it is made out that Mr. Drax and his tenants have used this way, not exclusively for agricultural purposes, but for all purposes for which they wanted it, in the state in which the land was at the time of the supposed grant—at the time when the way first began—and assuming that there has been no material alteration in the premises since that time, does that entitle Mr. Drax to alter substantially and increase the burden on

the servient tenement by building any number of houses he pleases on this property and giving to the persons who inhabit those houses a right to use the way for all purposes connected with the houses. I certainly was under the impression when this case was opened that the owner of the dominant tenement could not increase or alter the burden on the servient tenement in any such way as that. Mr. Miller called our attention very pointedly to the language of Mr. Baron Parke in *Cowling v. Higginson* (*), which certainly raised some doubt in my mind as to what the true rule of law is. But now that the other cases have been cited, I doubt whether Baron Parke had the question now before us present to his mind, and I am of opinion that the true rule is that laid down by Lord Chief Justice Bovill and Mr. Justice Willes in the case of *Williams v. James* (*), and substantially assented to by Baron Parke himself in the case of *Henning v. Burnett* (*). In *Cowling v. Higginson* (*) *Lord Abinger is cautious in the way in which he lays [371 down the rule. He says (*): "If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shows a user for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed." If he has used it only for purposes connected with the occupation of the land in its existing state, that may be considered to be a user for particular purposes, and I have a doubt whether Baron Parke really intended the contrary, for if the facts in *Cowling v. Higginson* are looked at it will be found that the mines had been opened, and therefore, though they had not been worked for seventy years, it was a property with existing mines in it. The way, it is true, had not been used for those mines, but as the property was a property within which there were opened mines, it might fairly be inferred that the right extended to using the road for the purposes of the mines, the working them being a reasonable use of the land in the condition in which it was. But however that may be, in my opinion the true rule is that stated by Lord Chief Justice Bovill, that when a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the sup-

(*) 4 M. & W., 245.

(*) Law Rep., 2 C. P., 577.

(*) 8 Ex., 187.

(*) 4 M. & W., 245, 256.

(*) 4 M. & W., 256.

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C.A.

posed grant. Mr. Justice Willes evidently agrees with that view.

That being the rule, what are the purposes for which, according to the ordinary and reasonable uses to which this land might be applied, according to its state at the time of the grant or supposed grant, this road may be used. When Warren Farm was first inclosed we do not know, but at whatever time it may have been inclosed, one cannot suppose that anybody thought of its being used for general building purposes, though no doubt the owner of the farm must always have required, first of all, the way to the Kingston Road in one direction, and then a way to Wimbledon, which lies in another direction. Is there any such evidence of user for purposes beyond what was necessary, and beyond what was reasonably required for the occupation of the land in its existing state, as that *we can find that the right extends beyond that? I agree, if we found that several houses had been built from time to time, and that the owner had carried the materials over this road, and the occupiers of the new houses had used the road, we might infer that the right of way was not to be confined to those particular houses, because that was not the original grant, but that the parties contemplated building generally at the time of the original grant, and intended to include in it a right of way to all future houses. I will not say that there is no evidence here of such a right, but there is not sufficient evidence for us to act upon, or to lead us to say that there is a right beyond what is necessary and reasonable for the occupation of the premises as a farm. The enlargement of Warren Farm House does not carry the right beyond a right for farming purposes. It would be a very narrow construction to say that where a small farm house with some small buildings was erected 200 or 300 years ago the right of way to it did not include a right of carting materials to enlarge the farm buildings so as to adapt them to the present state of agriculture.

Then with regard to the changing a mud cottage into a brick cottage. That is very weak evidence, if it is evidence at all; because if a mud cottage becomes unfit for human habitation, and is rebuilt with brick, although there is the carrying of bricks for the time, the burden is not permanently increased, for going to the brick cottage after it is once built is no greater burden than the going to the mud cottage. The other users that occurred of taking away gravel, of going there for the purposes of shooting, are users reasonably connected with the occupation of the prem-

ises, as they have been during the whole time that the right of way has existed, as far as we know. I am therefore of opinion that it is not made out that there is any right to use this road for the purpose of erecting entirely new buildings, and then, after those buildings are erected, to use the road for the purpose of those buildings. I agree, therefore, that the appeal must be dismissed.

BAGGALLAY, J.A.: I am of the same opinion. It appears to me that there are two *questions for decision in [373 this case. First, what is the extent of the right of way which is proved by the evidence in the case, and, secondly, if a right of way is established limited to particular purposes, whether it can be extended consistently with the rules of law applicable to questions of the like kind. I think the judgment of Mr. Baron Parke in the case of *Cowling v. Higginson* ⁽¹⁾ has been interpreted so as to extend its application beyond what that learned Baron intended. It is true that in one part of the judgment he uses this expression: "If it is shown that the defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to show that they had a general right to use it for all purposes, and from which a jury might infer a general right." Those words taken by themselves point in the direction of Mr. Miller's argument; but I think those wide words are qualified by this further statement: "If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all." Now let us take the case of an agricultural district where there had been a right of way to certain land exercised for agricultural purposes only for a length of time, and then it appears that there is valuable gravel on the estate, and the gravel is raised and sold from time to time, and carried over the way previously used for agricultural purposes alone; if afterwards other mineral produce is found and raised, and the way is used for carrying that away, and then the way is used for a variety of other purposes that from time to time arise in the course of the occupation of the land, I can understand that if the case went to a jury, with user for all this variety of purposes established, the jury would or might infer that the original grant was a grant for all purposes. No such case arises here. If it is not proved by evidence—as I think it is—it is admitted that the right of way was used for agricultural purposes from time immemorial. In addition to

(1) 4 M. & W., 256.

that, two or three users are suggested as going beyond agricultural purposes, but do not appear to me to do so, such as building a new barn, adding a wing to the house, and the shooting. Then we have two slight circumstances—the re-374]] placing a mud cottage upon a portion of *the property by a more substantial building, and the taking gravel and carting it away. We have no evidence of usur for any purposes beyond the purposes I have referred to. If the case came before me as a juryman to say whether I would infer a right to use the way for all purposes, I should answer “No.” It is not like a general user for all purposes, such as Baron Parke contemplated. Therefore the first question must be answered that the right of way extended to the purposes for which it has hitherto been enjoyed, and no further.

Then the second question is, whether the right to use this way being limited to the particular purposes, as to which there has been actual proof, can be extended to the purposes for which the defendant desires to use it. I think he cannot do that consistently with the rules of law which have been from time to time enunciated, and particularly in the case of *Williams v. James* (¹), that you must neither increase the burden on the servient tenement, nor substantially change the nature of the user. Answering the questions that arise in this case in the way I have suggested, it appears to me that the judgment of the Master of the Rolls is correct; and, subject to the modification which has been mentioned by the Lord Justice, there must be an injunction.

BRAMWELL, B.: I agree. I have nothing to add.

Solicitors: *Horne & Hunter*; *Ward & Letchworth*.

(¹) Law Rep., 2 C. P., 577.

[Law Reports, 1 Chancery Division, 375.]

C.A., Dec. 9, 1875.

375] *In re DANIEL'S SETTLEMENT TRUSTS.

Construction—Settlement—Limitation to Children—Omission supplied.

By a post-nuptial settlement reciting an intention to make further provision for the children of the marriage, certain sums of stock were vested in trustees in trust for the wife for life, and after her decease upon trust for all and every the child and children of the marriage who being a son or sons should attain the age of twenty-one years, equally to be divided between or among them and their respective executors and administrators; and if there should be but one such child, the whole to be in trust for such one or only child, *his or her* executors and administrators. There followed a clause directing that the trustees should, during the minority of each of the said children, pay to the father, to be by him applied or not as he should think fit, and after his decease should apply, the income of the presumptive share of every such child for or towards *his or her* maintenance and education until *his or her* share should become vested, or *he or she* should previously die:

Held (reversing the decision of the Master of the Rolls), that daughters who attained twenty-one were entitled to share in the fund.

Semble, daughters would not acquire a vested interest till they attained twenty-one.

THIS was an appeal from a decision of the Master of the Rolls.

By a post-nuptial settlement dated the 25th of May, 1831, reciting that Thomas Daniel, for the purpose of making some further provision for Anna Maria his wife, and his children by her, was desirous and had agreed to assign and settle the several sums of stock thereafter mentioned, Thomas Daniel settled several sums of stock upon trust to pay the income to Anna Maria Daniel for life for her separate use, and after her decease "In trust for all and every the child and children of the said T. Daniel by the said A. M. his wife, begotten or to be begotten, who being a son or sons have or hath already attained or shall hereafter live to attain the age of twenty-one years, equally to be divided between or among them, share and share alike, as tenants in common, and their respective executors and administrators; and if there shall be but one such child, the whole shall be in trust for such one or only child, and *his or her* executors and administrators; and upon further trust that they the said [trustees] shall and do in the meantime, after the decease of the *said A. M. Daniel, during the minority of each of [376 the said children, pay unto the said T. Daniel, to be by him applied or not as he shall think proper, and after his decease do and shall, by themselves or himself, pay and apply the dividends and annual proceeds of the presumptive share of every such child in the said trust funds and premises for or towards *his or her* respective support, maintenance and education until such *his or her* respective share shall become vested, or *he or she* shall previously die." There followed a power to sell all or any part of the expectant share "of each of the said sons" in the trust funds, and apply the same for his preferment or advancement, though his share should not then have become vested.

There were eight children of Mr. and Mrs. Daniel, three sons and three daughters who attained twenty-one, and two sons who died in early infancy. Mrs. Daniel being dead, the question now was whether the fund was divisible in sixths among the sons and daughters who attained twenty-one, or whether it belonged to the three sons only. The Master of the Rolls decided in favor of the latter view. One of the daughters and her husband appealed.

Beaumont, for the appellants, having opened the case, was stopped by the court.

Bagshawe, Q.C., and *W. S. Owen*, for the respondents: We may conjecture that there has been an accidental omission, but it is only a conjecture, there being no ambiguity in the words of the operative clause. The words "who being a son or sons" are a part of the description of the takers. If the daughters took shares at all, their interests were evidently intended to be subject to a contingency. But what was the contingency? No doubt this settlement was made up out of forms providing for daughters as well as sons, but it is mere conjecture that the limitations in favor of daughters were omitted by accident, and not struck out on purpose. *Cholmondeley v. Clinton* ⁽¹⁾ supports our case. In *Langston v. Langston* ⁽²⁾ there were words, such as do not occur here, to show an intention that the eldest son should [377] take. The words "his or her executors and administrators" are pure surplusage, and much weight, therefore, ought not to be given to them.

JAMES, L.J.: With all respect to the decision of the Master of the Rolls, and with a full sense of the importance of not allowing ourselves in the construction of instruments to import into them, by conjecture an intention which they do not express, I think this case reasonably clear. In the first place, there is a recital of an intention to make provision for the children of the marriage. Then the trust commences with the words "for all and every the child and *children*," and concludes with "and if there shall be but one such child, the whole shall be in trust for such one or only child and *his or her* executors and administrators." There follows a provision that, after the decease of the wife, the trustees should, during the minority of each of the said children, pay to the husband, and after his decease, apply the income of the presumptive share of every such child for or towards *his or her* maintenance and education until *his or her* share should become vested, or *he or she* should previously die. There is, therefore, on the face of the settlement abundant evidence of an intention to provide for children both male and female. The only reason for excluding daughters is the insertion of the words "who being a son or sons shall attain the age of twenty-one years," which are said to be a necessary qualification of the takers, and to confine the class to male children. These words are part of a common form, and we must deal with the case as if the clause had run "for all and every the child and children who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall—and if there shall be but

⁽¹⁾ 2 Jac. & W., 1.

⁽²⁾ 2 Cl. & F., 194.

one such child then the whole shall be in trust for such one or only child, his or her executors and administrators." The only question then would be what is to be supplied; and as maintenance is given during minority, I should have no difficulty in supplying "attain twenty-one." If we were to affirm the decision of the Master of the Rolls, I think we should be adhering to the mere letter and disregarding the spirit of the instrument.

*MELLISH, L. J.: I am of the same opinion. If the [378 operative part of an instrument is clear, effect must be given to it, but if it is obscure and inconsistent, we may resort to any other part of the instrument to explain it. Here, if the declaration of trust had contained only the words "for all and every the child and children who being a son or sons shall attain the age of twenty-one years," every one must have said that if the intention was to provide for sons only the sentence was most awkwardly framed, and that it was impossible to say why "child and children" had been used instead of "son and sons," and it would have been impossible to avoid thinking it very probable that there had been an accidental omission of some words applying expressly to daughters, though I do not think that this probability would have been enough to enable the court to hold the daughters entitled. But when we look at the concluding part of the declaration, "and if there shall be but one such child, in trust for such one or only child and *his or her* executors and administrators," we find that the words "his or her" create an ambiguity, and we may look at the rest of the instrument to remove it. When we look at the recital and the maintenance clause, we find clear indications of an intention to provide for daughters as well as sons, and as the daughters have attained twenty-one, I am of opinion that they are entitled to share in the fund.

BAGGALLAY, J.A.: I am of the same opinion; and I think that this conclusion may be arrived at on the operative part of the instrument alone, without reference to the recital or to the power of maintenance. The operative part speaks first of "children," and then of a single "child, *his or her* executors and administrators." The words "his or her" show that "child" in the latter part of the clause means "son or daughter." The settlor therefore has shown in what sense he uses the word "child." We may then read the clause thus: "Upon trust for all and every the son or daughter, sons or daughters, who being a son or sons shall attain the age of twenty-one years, and if there shall be only one such son or daughter, upon *trust for such one or only [379

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son or daughter, his or her executors or administrators." Thus read, the gift is a gift to sons and daughters with a qualification as to the sons alone. The settlor, no doubt, intended a qualification as to the daughters also, but so far as the operative part is concerned, he has omitted it, though probably it might be implied from the maintenance clause. I think, therefore, that, taking the operative part alone, daughters as well as sons are the objects of the gift; and this conclusion is much strengthened by the recital and the maintenance clause.

BLACKBURN, J.: I am of the same opinion. The first words of the declaration of trust include all the children, daughters as well as sons, and daughters must therefore be objects of gift unless the words "who being a son or sons" are intended to express a necessary qualification of all persons who are to take. The concluding words "*his or her* executors and administrators" show that in some cases a daughter might take. The words "who being a son or sons shall attain the age of twenty-one years" cannot therefore be construed as expressing a qualification of all the objects of gift, but only a modification of the gift to such of the children as were sons. Mr. Bagshawe argued that the words "his or her executors and administrators" were surplusage, and that therefore much regard was not to be had to them; but I cannot accede to that argument. The language of the maintenance clause shows, further, that daughters were intended to be included. There might have been a difficulty if any of the daughters had died under twenty-one, but as they all attained twenty-one this question does not arise.

Solicitors: *Few & Co.; Cole, Cole & Jackson.*

[Law Reports, 1 Chancery Division, 380.]

C.A., Dec. 9, 1875.

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*SWABEY V. GOLDIE.

[1873 S. 100.]

Will—Construction—Distribution per Capita or per Stirpes.

A testatrix gave the income of one moiety of her residuary estate to her daughter Margaret for life, and the income of the other moiety to her daughter Mary Ann for life, and then directed her trustees to stand possessed of one moiety of her estate from and after the death of Margaret, and of the other moiety from and after the death of Mary Ann, in trust to pay, transfer, and assign the same unto and amongst all the children of Margaret living at her decease, and the issue then living of any children of hers who should have died in her lifetime, and all the children of Mary Ann who should be living at her decease, and the issue then living of any children of hers who should have died in her lifetime, to be equally divided between or

among them if more than one, and if there should be but one such child and no issue of any deceased child, or no such child and only one grandchild of such other issue, then the whole to such one child, grandchild, or other issue; the issue of a deceased child taking their parent's share :

Held (affirming the decision of Bacon, V.C.), that the full and elaborate language of the will, which clearly imputed a distribution of the whole fund *per capita* among the children of both daughters could not be controlled on the ground of the inconvenience of keeping a moiety of the fund in suspense from the death of one daughter till the death of the other, though in some cases, where the language was very concise and obscure, the court had held the share of each of the tenants for life divisible on his death among his own children exclusively.

THIS was an appeal from a decision of Vice-Chancellor Bacon on the construction of a will.

The testatrix, by will dated the 15th of October, 1832, directed her trustees to stand possessed of the proceeds of her residuary estate upon trust to invest them as therein mentioned, and to stand possessed of the trust moneys and the investments thereof, "upon trust to pay, apply and dispose of one moiety of the dividends, interest and annual proceeds thereof," during the life of her daughter Margaret Simpson, to such persons as M. Simpson should appoint, and in default of appointment, to M. Simpson for her separate use. "And as to the other half part or share of the said residue of the said trust moneys and the stocks, funds and securities on which the same shall be invested," upon trust to pay, apply and dispose of the income thereof during the life of the testatrix's daughter Mary *Ann Swabey, [38] "in like manner and subject to the like directions for the separate and exclusive use and benefit during the natural life of my said last named daughter, as I have hereby expressed of and concerning the other moiety of the said dividends, interest and annual proceeds for the benefit of my said daughter Margaret Simpson." She then proceeded as follows :

"And I further direct that the said [trustees] and the survivor of them, his executors, administrators, and assigns, shall stand possessed of one equal half part or share of the said trust moneys, stocks, funds, and securities arising from the residue of my personal estate, from and immediately after the death of the said Margaret Simpson, and of the said other half part or share thereof from and after the death of the said M. A. Swabey, upon and for the trusts and purposes and subject to the provisos, declarations, and directions hereinafter expressed and declared of and concerning the same (that is to say), in trust to pay, transfer, and assign the same unto and amongst all and every the child and children of my said daughter M. Simpson, begotten or to be begotten, living at the time of her decease, and

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the lawful issue then living of any child or children of her my said daughter Margaret Simpson who shall have died in her lifetime, and all and every the child and children of my said daughter M. A. Swabey, begotten or to be begotten, living at the time of her decease, and the lawful issue then living of any child or children of her my said daughter M. A. Swabey who shall have died in her lifetime, to be equally divided between or among them, if more than one, share and share alike, and if there shall be but one such child and no issue of any deceased child, or no such child and only one grandchild, or such other issue, then the whole to such one child, grandchild, or other issue. Nevertheless my will is that the issue of any such deceased child or children shall take the same and no greater share than his, her, or their parent or parents would have been entitled to if then living."

The testatrix died in 1838. M. A. Swabey died in 1869, leaving ten children and one grandchild, the issue of a deceased child. The trustees thereupon divided one moiety of the residuary estate in elevenths among the children and grandchild.

382] *Margaret Simpson died in 1872, leaving two children and six grandchildren, the children of a daughter who had died in her lifetime. The question was then raised whether the view which had been acted upon in 1869 was correct, and this bill was filed to take the opinion of the court.

Vice-Chancellor Bacon decided that the entire residuary estate was divisible in fourteenths, the issue of the two daughters forming only one class. The children of Mrs. Simpson appealed.

Kay, Q.C., and *Macnaghten*, for the appellants: We contend that at the death of each daughter her moiety became divisible among her issue. The principle of the cases is, that where the fund is to be kept together and divided at one period, there is no reason for inferring distribution *per stirpes*; but if it is divisible at different times, then the distribution *per stirpes* is to be preferred: *Hawkins on Construction of Wills* ('); *Willes v. Douglas* ('); *Arrow v. Mellish* ('); *Waldron v. Boulter* ('); *Turner v. Whittaker* ('); *Wills v. Wills* ('); *Jarman on Wills* (').

In *Smith v. Streatfield* (') there were directions which made

(1) Page, 114.

(2) 10 Beav., 47.

(3) 1 De G. & Sm., 355.

(4) 22 Beav., 284.

(5) 23 Beav., 196.

(6) Law Rep., 20 Eq., 342.

(7) 3d ed., vol. ii., pp. 181-183.

(8) 1 Mer., 358.

the fund divisible at one time. Here we have directions for immediate division as to each moiety, and if the division is *per capita*, any immediate division on the dropping of the first life is impossible.

[BLACKBURN, J.: The direction is that from and immediately after the dropping of a life the trustees are to hold that share in trust, &c., and not that they are at once to divide it.]

Jackson, Q.C., and Kekewich, for the respondents: We admit that the argument *ab inconvenienti* has great weight where the language of the will is obscure, but it has none where the language is clear. All the cases referred to against us are cases of very concise and inaccurate language, which might, without doing any violence to it, be construed either way. Here we have a will which, though not skilfully framed, is full and *elaborate, and its [383 distinct terms cannot be departed from. *Abrey v. Newman* (') and *Malcolm v. Martin* (') show this.

Macnaghten, in reply: *Malcolm v. Martin* has often been doubted, and is not in point, for there it was held to be only one period of division.

JAMES, L.J.: The construction which the Vice-Chancellor has put upon this will might have led to great inconvenience, though in the event it happens not to have done so; but, having regard to the elaborate way in which the will is framed, and to the mode in which the testatrix with legal assistance has worked out her intention, it would be dangerous if we were to interpolate words, or to alter the words constituting the clause. There was an inconvenience, which the testatrix appears to have overlooked, in keeping a moiety of the fund, both principal and income, in suspense from the death of one tenant for life to that of the other, but everything else is against the appellants. The testatrix first deals with one moiety, giving a life interest in it. Next she gives a life interest in the other. She then puts the two moieties together for the purpose of disposing of the capital as a whole. The context appears to me to be rather in favor of than against the literal construction. There is no direction for an immediate division when the daughter dies, but on her death the trustees are to stand possessed of that moiety in trust for division among a certain class, which is quite consistent with the view that the class might not be ascertained at once. In my opinion the appeal must be dismissed.

MELLISH, L.J.: I am of the same opinion.

(') 16 Beav., 431.

15 ENG. REP.

(') 3 Bro. C. C., 50,

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BAGGALLAY, J.A.: I also am of opinion that the decision of the Vice-Chancellor was right. We must look to what the fund is, among whom it is to be divided, and when the 384] division is to take place. The *testatrix disposes of two moieties, keeping them distinct in the first part of the will and combining them in the second part, where they are given to a compound class consisting of children of A. living at her death, and children of B. living at her death. The disposition in fact amounts to this, "Subject to the above life interests, I give my whole estate among," &c. In every one of the cases cited by Mr. Kay a form of words was used which was ambiguous from its conciseness, and in four of them death was spoken of in the singular number, though several persons could not be expected to die at once.

BLACKBURN, J.: I am of the same opinion. If the will had dealt with each moiety separately, giving it over in the same terms as those which have been used, there could have been no dispute. If the testatrix had consulted us we might have said, "Do you observe that you are making half the fund available to nobody from the death of one of your daughters till that of the other." And she would very likely have attached great weight to this, if what she was giving had been the whole provision for the family; but, for anything we know, it may have been nothing but pocket-money, and she might have said, "There is an inconvenience in that, but still I prefer this mode of division to a division *per stirpes*." To give effect to the contention of the appellants, we must interpolate after the words "in trust to pay, transfer, and assign the same," the words "as regards the share of my daughter Margaret," and then further on, before the words "all and every the child and children of my daughter Margaret Simpson," the words "and as regards the share of my daughter Mary Ann, unto and amongst." That is putting in a great deal. The testatrix, if it had been called to her attention, might have preferred it, but on the other hand it might have defeated her intention.

Solicitors: *Burton, Yeates & Hart; Few & Co.*

[Law Reports, 1 Chancery Division, 385.]

C.A., Dec. 3, 6, 13, 1875.

*MUTLOW V. BIGG.

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[1873 M. 29.]

Conversion into personality—Reconversion into Realty—Election by Conduct—Trust for Sale, Proceeds to become Personal Estate—Rights of unpaid Legatees.

A testator, after giving certain legacies, devised a freehold house to A., B. and C., in trust for sale, the proceeds to be considered part of his personal estate, and gave his residuary real and personal estate to A., B. and C. A., B. and C. paid all the legacies except two out of other parts of the testator's estate, and kept the house unsold, granting a lease of it to a tenant. The house remained unsold for fifty years, and the two legatees permitted their legacies to remain during all that time unpaid, without requiring a sale or any formal security on the house :

Held, in a suit by the personal representative of C. against the real and personal representatives of the testator for the administration of his estate, that A., B. and C. had by their conduct elected to take the house as reconverted into real estate ; that the assent of the unpaid legatees might be inferred ; and bill dismissed accordingly.

The decree of Hall, V.C., reversed on further evidence.

THIS was an appeal from a decision of Vice-Chancellor Hall⁽¹⁾.

Edward Bigg, by his will, dated the 6th of January, 1820, after giving certain legacies, made the following dispositions : " I give to my son Edward Smith Bigg and to my daughters Sarah Anne Bigg and Emma Frances Bigg, my executor and executrixes hereinafter named, their heirs and assigns, my freehold messuage or tenement in Fenchurch Street, and also my two freehold messuages or tenements in Fenchurch Buildings, London, to hold the same to my said executor and executrixes, their heirs and assigns, in trust to sell and dispose of the same, and convert the same into money, and the money arising by such sale to be considered part of my personal estate." The testator then bequeathed to his daughter Anne Lucy Hallen, for her separate use, the sum of £1,000, to his daughters Ellen Elizabeth Bigg, Lucy Maria Bigg, and his sons Smith Henry Bigg and William Robert Bigg, the sum of £2,500 each ; and he then demised and bequeathed unto the said Edward Smith Bigg, Sarah Anne Bigg, and Emma Frances *Bigg, all the rest, residue and remainder of his [386 estate and effects whatsoever and wheresoever, freehold, copyhold and personal, to hold to them as tenants in common, their several and respective heirs, executors, administrators and assigns forever.

(1) 9 Eng. Rep., 784.

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The testator died on the 23d of July, 1823, and his will was proved by Edward Smith Bigg and Sarah Anne Bigg alone on the 8th of November, 1823.

Besides the freeholds specified in the will, the testator died possessed of three freehold houses in Middlesex, and certain leaseholds, and other personal estate.

Edward Smith Bigg took possession of the real and personal estate, and paid out of the personal estate, irrespective of the leaseholds, the testator's debts and some of the legacies; but he was unable to pay all the legacies without having recourse to the freeholds and leaseholds.

In the year 1829 Edward Smith Bigg, Sarah Anne Bigg, and Emma Frances Bigg sold the freehold houses in Fenchurch Buildings for £1,010. At the same time they attempted to sell the house in Fenchurch Street, but could not get the price at which it was valued, and it remained unsold up to the time of the filing of the bill.

In the year 1832 Edward Smith Bigg, Sarah Anne Bigg, and Emma Frances Bigg conveyed the three houses in Middlesex, which were not comprised in the trust for sale, to Smith Henry Bigg in satisfaction of his legacy of £2,500.

The defendants stated that Edward Smith Bigg and his two sisters, Sarah Anne Bigg and Emma Frances Bigg, were desirous of keeping the house in Fenchurch Street, both because it had been in the family some time, and because the property was rising in value. In the year 1838 Edward Smith Bigg, Sarah Anne Bigg, and Emma Frances Bigg joined in granting a lease of the house for twenty-one years to a tenant, in which the rent of £210 was reserved to them, their heirs and assigns. On that occasion Edward Smith Bigg laid out a considerable sum of his own money in improving the property. It was also proved that he expended some of his own money in payment of some of the legacies; and it was also stated by the defendants that some of his sisters had advanced money for the same purpose.

387] *In the year 1837 Edward Smith Bigg passed the residuary account of the testator's estate. At that time all the debts, funeral and testamentary expenses, were paid, and all the legacies, except those of £2,500 each to Ellen Elizabeth Bigg and Lucy Maria Bigg, which remained unpaid at the time of the filing of the bill.

Emma Frances Bigg died intestate in May, 1844. Edward Smith Bigg was her heir-at-law.

Sarah Anne Bigg died in July, 1865, having by her will given her residuary real and personal estate to the children of her brother, Smith Henry Bigg. Administration with

her will annexed was granted to her sister Lucy Maria Bigg.

In the year 1859 Edward Smith Bigg and Sarah Anne Bigg sold some of the leasehold property comprised in the residuary gift for £3,000; and for the purpose of completing the title, Edward Smith Bigg took out administration to the estate of his deceased sister, Emma Frances Bigg.

After the death of Sarah Anne Bigg, Edward Smith Bigg sold another portion of the leaseholds for £2,440. The remainder of the leaseholds still remained unsold at the time of the filing of the bill.

The residuary legatees, Sarah Anne Bigg and Emma Frances Bigg, and also their sisters Ellen Elizabeth Bigg and Lucy Maria Bigg, after their father's death, went to reside with their brother Edward Smith Bigg, and he paid them from time to time sums of money for pocket-money out of the income of their father's property for the time being remaining unsold, the rest of the income being expended by him in housekeeping for the family. But no written agreement was made, and no settlement was come to, either with Sarah Anne and Emma Frances as to their shares in the residuary estate, or with the other two sisters as to their legacies of £2,500 each. A memorandum was, however, found after the institution of the suit, in the handwriting of Edward Smith Bigg, but without date and in the following terms:

"Memorandum—That the legacies given by my father's will to my sisters Ellen and Lucy have been unpaid, and the principal sums of £2,500 each are still due and payable upon his property, two-thirds of which are now my property, and one-third belongs to my sister Sarah Anne Bigg."

*Edward Smith Bigg died in February, 1871, having by his will, dated the 7th of September, 1869, given his residuary real and personal estate to the children of his brother Smith Henry Bigg, share and share alike, and appointed his sister Lucy Maria Bigg his sole executrix.

After the death of Edward Smith Bigg, the plaintiff, Mary Mutlow, who was a niece of Emma Frances Bigg, took out administration *de bonis non* to her estate, and she and her husband filed the present bill against Lucy Maria Bigg and Smith Henry Bigg, the executrix and heir-at-law of Edward Smith Bigg, praying for administration of the personal estate, and the execution of the trusts of the will of the original testator, Edward Bigg.

The principal object of the suit was to obtain possession of Emma Frances Bigg's share of the freehold houses in

Fenchurch Street, which had greatly increased in value since the testator's death.

The defendants by their answer set up the Statute of Limitations.

The Vice-Chancellor held that the trust was an express trust within the 25th section of the Statute of Limitations (3 & 4 Will. 4, c. 27), and declared the plaintiffs entitled to a decree for the execution of the trusts of the will so far as related to the unsold land. The decree, however, as drawn up extended to all the property devised in trust for sale. From this decree the defendants appealed.

The appeal came on to be heard before the full Court of Appeal on the 12th of November, 1874, when the counsel for the appellants relied upon an objection to the title of the plaintiffs, which was not urged at the hearing before the Vice-Chancellor, namely, that Edward Smith Bigg, Sarah Anne Bigg, and Emma Frances Bigg, had elected to take the house in Fenchurch Street as real estate, and that the plaintiffs, who were only the personal representatives of Emma Frances Bigg, had no title, even though the Statute of Limitations were no bar; and their Lordships, considering that the whole of the facts bearing on the question of the reconversion of the property into real estate were not before the court, ordered the appeal to stand over, with liberty to the plaintiffs to amend the bill and for the parties to put in fresh evidence.

389] *The plaintiffs accordingly amended the bill, making the children of Smith Henry Bigg, who were the devisees of the real estate of Emma Frances Bigg, defendants, and the original defendants put in a voluntary answer. The dealings with the property, as stated above, were thus fully brought before the court. The defendants also stated that the legacies to Ellen Elizabeth and Lucy Maria Bigg had in fact, since the filing of the bill, been satisfied out of the assets of Edward Smith Bigg.

The appeal now came on again for hearing before the Court of Appeal.

Morgan, Q.C., and *Marcy*, for the original defendants, Lucy Maria Bigg and Smith Henry Bigg: The whole facts, so far as it is now possible to ascertain them, being before the court, it is clear that the residuary legatees elected to retain this freehold house in specie, and that it was, as between their real and personal representatives, reconverted into real estate. In that case the plaintiffs have no interest independently of the effect of the Statute of Limitations. The three residuary legatees were absolutely entitled to the house

subject to the payment of the testator's debts and legacies. In the year 1837 all the debts had been paid, and all the legacies, except those due to the two sisters Ellen Elizabeth and Lucy Maria Bigg. In 1832 the residuary legatees satisfied Smith Henry Bigg's legacy by the sale to him of another part of the estates not included in the trusts. If they had in like manner paid off the two sisters' legacies, there would have been no question as to their right to take the house as real estate. What difference could the non-payment of these two legacies make?

The evidence is conclusive that the legatees acquiesced in the postponement of the legacies, and it is exactly the same as if they had accepted a formal mortgage of the house instead of payment. It would be unreasonable that the court should hold that land devised in trust for sale could retain for an indefinite time the character of personal estate although all parties interested acquiesced in its being held in specie.

The defendants expressly state that the object of the three *residuary legatees, and indeed of the whole family, [390] was not to sell the property, both because it had been in the family some time, and because it was increasing in value; and the whole circumstances of the case, especially the payment of Smith Henry Bigg's legacy by means of the sale of another part of the property, the granting of a lease of the house in Fenchurch Street, and the laying out of money by Edward Smith Bigg in improving the property, confirm that view. We contend, therefore, that they both had the power to elect, and did elect, to take the house as real estate: *Crabtree v. Bramble* ⁽¹⁾; *Davies v. Ashford* ⁽²⁾; *Griesback v. Freemantle* ⁽³⁾; *Pulteney v. Darlington* ⁽⁴⁾; *Cookson v. Cookson* ⁽⁵⁾; *Fletcher v. Ashburner* ⁽⁶⁾.

With respect to the Statute of Limitations, we contend that the Vice-Chancellor was wrong in holding that there was an express trust under the 25th section of the 3 & 4 Will. 4, c. 27. There was no relation of trustee and *cestui que trust* created between the devisees in trust for sale and the legatees. There was only a direction to the trustees to turn the estate into money so that it might become part of the testator's personal estate in the hands of the executors. The plaintiffs, as personal representatives of Emma Frances Bigg, can only claim a share as residuary legatees.

If the executors and trustees for sale had been different

⁽¹⁾ 3 Atk., 680.

⁽²⁾ 15 Sim., 42.

⁽³⁾ 17 Beav., 314.

⁽⁴⁾ 1 Bro. C. C., 223.

⁽⁵⁾ 12 Cl. & F., 121.

⁽⁶⁾ 1 Wh. & T. L. C., 741, 3d ed.

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persons the right of a residuary legatee against the executors would have been now barred by the statute, and the legatee could not have proceeded against the trustees to force them to sell the estate: *Dickenson v. Teasdale* ('); *Knox v. Kelly* ('); *Young v. Wilton* ('); Shelford's Real Property Statutes ('); *Philippo v. Munnings* ('); *Pawsey v. Barnes* (').

Davey, Q.C., for the children of Smith Henry Bigg, supported the same contention as to the reconversion of the property into real estate, and referred to *Dixon v. Gayfere* (').

391] **Dickinson*, Q.C., and *Bunting*, for the plaintiffs: We contend, first, that the three residuary legatees, Edward Smith Bigg, Sarah Ann Bigg, and Emma Frances Bigg, were never in a position in which they could elect to treat the estate as reconverted into realty. However distinctly they might have expressed their desire to elect, whether verbally or in writing, they had no power to elect so long as any of the legacies remained unpaid. Whether the legatees consented or not makes no difference. No doubt they consented to postponement of payment for one reason or another; but there is no proof that they agreed to accept a permanent charge on the estate instead of a right of payment under the trusts of the will. The undated memorandum is clearly subsequent to the death of Emma Frances Bigg, whom we represent, and is itself a proof that no such arrangement was made in her lifetime. If the legal estate had been in other persons as trustees, they were never in a position to say to them, "All the purposes of the trust for conversion are at an end; convey the legal estate to us." They were never completely *domini* of the estate: *Sisson v. Giles* ('); *Barker v. May* (').

In the second place, we say that the residuary legatees never did elect to hold the house as land. It is true that they postponed the sale of it, but that was merely for the purpose of waiting for a better market, as the property was rising in value; and it is in evidence that in 1829 they did actually attempt to sell it. The mere fact of keeping the property unsold is not an election to take it as land. They dealt with the leasehold property in the same way, selling from time to time as they had a good opportunity. The

(') 1 D. J. & S., 52.

(') 6 Ir. Eq. Rep., 279.

(') 10 Ibid., 10.

(') 7th ed., p. 218.

(') 2 My. & Cr., 309.

(') 20 L. J. (Ch.), 393.

(') 17 Beav., 483.

(') 3 D. J. & S., 614.

(') 9 B. & C., 489.

fact of their granting a lease of the house is not inconsistent : it would possibly make the freehold sell better.

In the third place, we contend that we are entitled to a general administration decree. The plaintiff Mary Anne Mutlow is the administratrix of Emma Frances Bigg, and there is no statute which prevents our getting a decree against the defendant Lucy Maria Bigg, who represents the original testator Edward Bigg, for the administration of his estate. In the year 1859, which is less than twenty years ago, some part of the testator's leasehold estate was still in the hands of Edward Smith Bigg and Sarah *Anne [392 Bigg, his surviving executors, unsold, and they then sold it for £1,100. On that occasion Edward Smith Bigg took out administration to Emma Frances Bigg to complete the title, but the two survivors received the purchase-money as executors. In 1872, Lucy Maria Bigg, as the administratrix of her sister Sarah Anne Bigg, received a sum of money as her share of the residuary estate of the original testator. Surely, we may call her to account for this.

JAMES, L.J.: It is not necessary, I think, to deal with the part of the case which was before the Vice-Chancellor. The only question before him was as to the effect of the two sections of the Statute of Limitations; but there was a point which was raised when the matter was before the Court of Appeal on a former occasion, and which appeared to the court as then constituted not to have been sufficiently raised on the pleadings and evidence, namely, as to the effect of the conduct of the parties in producing what is called in this court a reconversion. This matter, therefore, is now fully brought before us under circumstances showing what great danger there frequently is in endeavoring to give an effect to that which has been done for a long course of years, contrary to that which people themselves have been doing, when they have had no opportunity of explaining the circumstances under which they began doing it. In this case the testator died as far back as the year 1823; from the year 1823 until the filing of the bill on the 31st of January, 1873, that is very nearly fifty years, a certain portion of the real estate of the testator—his remaining real estate—has been enjoyed and dealt with as real estate; but in the year 1873 a person having some interest in the personal estate of a legatee under the will of the original testator who died in 1823, has filed a bill for the purpose of having it declared that that property which has been enjoyed as real estate for fifty years has all along been in contemplation of the Court of Equity personal estate, and is now to be sold and dealt

The existence of the right, such as it was, in them would not prevent the residuary legatees from exercising their election to take the property either in one character or in another. Just in the same way, it appears to me that if there had been any ordinary trust of an estate to sell and pay off a mortgage, and then to divide the surplus between three particular persons, and those three persons arranged with the mortgagee, and said, We do not want to have the mortgage paid off, and we wish to take the estate as realty and not personalty, the existence of a mortgage would not prevent them being in the same position as any other owners of such a trust estate. I am of opinion that under these circumstances the residuary legatees have expressed sufficiently their intention to elect, and that the charge on the estate, so far as it was a trust in favor of the particular legatees, could not operate to prevent their making and giving effect to that election.

Then there is another part of the case, as to the general residuary estate of this gentleman, who died in the year 1823, the final accounts of which were passed some time in 1837. This being in the second generation, all the next of kin living at that time, and all the people interested, having years and years ago been quite satisfied with everything that had been done, had never made a claim, and nobody from that time until this suit was instituted has endeavored in any way to interfere with what has been done with the property, or to upset any of the former arrangements. But it was said that there were some assets admitted to be in their hands. On the contrary, what is alleged with regard to the assets is that they were dealt with in a manner which showed that they belonged to the trustees themselves and not to the testator's estate.

Under these circumstances I am of opinion that the case fails altogether, and that the bill ought to be dismissed.

396] *MELLISH, L.J.: I am of the same opinion. The evidence proving that the three residuary legatees wished to take this as real estate, assuming that they had the power to take it as real estate, seems to me to be so strong as to leave the question beyond all possibility of doubt. First of all, a great number of years have passed, and you find them leasing the property as if it were their own. Then you find the payment of one of the legacies out of the other real estate which has been left, and a dealing with this estate in a way as if it were their own. I do not think any of the cases which have been cited come at all near the present with regard to the strength of the evidence that the parties

intended to take the property as real estate. It is said that they did not intend to take it as real estate, because in the first instance they put it up for sale and withdrew it, finding that they could not get a sufficient sum. From that it is assumed that they were always intending to have it sold. In a certain sense people possessed of property which they only keep because it is of value to them, may be said to intend to sell at a favorable opportunity. Here was property in the middle of the city of London, which evidently Edward Smith Bigg, who was the brother who managed the property altogether for his sisters, thought was property likely to increase in value, and that, no doubt, was a perfectly good reason for not selling it. If he wished it to continue to be kept as a permanent investment, I do not see how it is possible to come to any other conclusion than that he desired to keep it as real estate. That being so, the only real question is whether the circumstance of two of the legacies not being paid during Edward Smith Bigg's lifetime does, as a rule in this court, make it impossible that they should have elected to take it as real estate. If (as was fairly put in the argument) the residuary legatees and the trustees for sale were different persons, the residuary legatees, not having the legal estate in them, could not elect to take the property as real estate so long as the trustee kept it directly under the trust for sale without the consent of the persons who were entitled to call on the trustees to sell for the purpose of paying off the legacies, because, *as long as the trustees held it, it was their primary [397 duty to sell it.

Therefore, in that state of things, if they wanted to take it as real estate they would have to obtain the assent of the legatees. At the same time, if the legatees assented to the trustees that it should be held by the *cestuis que trust* as real estate, it being understood that they were to continue to have the charge on it, and in the meantime receive the interest, I do not see why the trustees should not carry out that intention. Here the trustees and the residuary legatees are the same persons. What difference does that make? Of course if a very short time had elapsed the court would, I think, require stronger evidence where there were legacies outstanding than if the legacies had been paid. At the same time it must be perfectly possible for the legatees to give such a consent as would justify the residuary legatees in treating the property as real estate, and if you can clearly see that the condition of things is such that the real position of the legatees is not injured in the least by

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their giving that consent, then the court would infer that consent was given on slight evidence. In the present case the evidence is that the two sisters whose legacies remained unpaid lived all their lives with their brother, left the principal with their brother, although they received from time to time sums on account from him, allowing him to deal with the property just as he pleased. They perfectly well knew, as is proved by the evidence of Lucy Maria Bigg, that he wished, and the other two sisters wished, to keep the property; they all assented to its being kept. Something was said about their wishing it to be kept because it was family property. I rely very little on that. Some reference was made to the fact that they wished it to be kept because they knew it was very valuable; they were all near relations to each other, all interested in the property being kept provided that it was the best thing to be done for the interest of everybody. Therefore I think we may fairly infer that they did assent to its being kept as real estate; and certainly it is a most inconvenient thing that property which really is real estate should remain for an indefinite time—fifty years, as in this case—and that it 398] should be treated all *that time as personal estate. Therefore where so many years have elapsed there is a stronger reason for assuming it had been treated as real estate with the assent of all persons whose consent was necessary. Therefore it appears to me in this case we are perfectly justified in assuming, that with the consent of the legatees and all the rest of the family it was agreed that this should be kept as real estate. I agree entirely with what Lord Justice James has said as to the second point.

BAGGALLAY, J.A.: I am of the same opinion, and for the same reasons. The only additional circumstance which I think it necessary to allude to is, that during the whole period of fifty years no member of the family who could have raised this question ever thought it desirable to raise it, and the question is now raised by representative persons who took out administration to Emma Frances Bigg one week before the bill was filed.

JAMES, L.J.: The bill must be dismissed with costs; but that will include the costs of only one hearing, namely, the present. The costs of the hearing before the Vice-Chancellor and of the former hearing before the Court of Appeal will not be allowed.

Solicitors for appellants: *Prior, Bigg, Church & Adams.*
Solicitors for respondents: *Singleton & Tattershall.*

[Law Reports, 1 Chancery Division, 399.]

C.A., Dec. 13, 14, 1875.

*ALLEN V. JACKSON.

[399]

[1874 A. 54.]

Will—Restraint of Marriage—Second Marriage of a Man.

A condition in restraint of the second marriage whether of a man or a woman is not void.

A testatrix gave the income of certain property to her niece (who was her adopted daughter) and her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived his wife and married again :

Held (reversing the decision of Hall, V.C.), that the proviso was valid, and that the gift over took effect.

THIS was an appeal from a decision of Vice-Chancellor Hall (*).

Mrs. Frances Jackson, a widow, by her will, dated the 7th of March, 1862, bequeathed the residue of her estate and effects to T. Allen and W. H. Jackson, whom she appointed her executors, upon trust out of the annual income to pay to her niece and adopted daughter, Ellen Ada Jackson, the wife of the defendant, Robert Noble Jackson, the annual sum of £40 for her life for her sole and separate use, and, in the next place, to pay the whole remaining income unto her nephew, the defendant R. N. Jackson, and the said Ellen Ada Jackson and their assigns during their joint lives, and after the decease of either of them then to the survivor during his or her life for their, his, or her own use and benefit. Provided, nevertheless, and she declared her will to be, that if the said Ellen Ada Jackson should depart this life in the lifetime of her husband, the said R. N. Jackson, and he should marry again, then she directed her said trustees and the survivors of them to stand possessed of the said trust property upon the trusts thereafter declared. And after the decease of her said niece and her surviving husband (if any), and subject to his marrying a second wife as aforesaid, she directed the said trustees or trustee to stand possessed of the said trust property in trust for the children and grandchildren of her said niece, Ellen Ada Jackson, as therein *mentioned, and in default of children or [400 grandchildren of her said niece, then in trust for the children of the testatrix's sister, Jane McCormick, who should be living at the time of the death of her said niece without

(*) 13 Eng. Rep., 564.

1875

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issue, in equal shares as tenants in common. The will contained powers of maintenance and advancement for the benefit of the infant children.

By a codicil the testatrix gave Jane McCormick an annuity out of the income of the trust property.

The testatrix died in January, 1863.

Ellen Ada Jackson died in January, 1864, without issue.

In January, 1874, her husband, R. N. Jackson, married again.

The trustees filed the present bill against R. N. Jackson and Mrs. McCormick and her children, praying for execution of the trusts of Mrs. Jackson's will, and for a declaration that R. N. Jackson had forfeited his life interest in the trust property.

The Vice-Chancellor held that the proviso defeating the life estate of the husband on his second marriage was void, and that he was entitled to the income of the property notwithstanding his second marriage.

Mrs. McCormick and her children appealed from this decision.

Fry, Q.C., and Smart, for the appellants: The condition in restraint of the second marriage of the husband is valid. Conditions in general restraint of marriage of an unmarried person, whether a man or a woman, were considered at common law to be against public policy, and therefore void; but that rule never extended to special restraints, such as against marriage with a particular person, or at a particular time, or without consent: *Younge v. Furse* (¹); *Harvey v. Aston* (²); *Perrin v. Lyon* (³); *Scott v. Tyler* (⁴); *Haughton v. Haughton* (⁵). Nor did it extend to the second marriage of either a man or a woman. With respect to a woman, it has been expressly held that such a condition is valid, whether the person who imposes it is the first husband 401] or a stranger: *Evans v. Rosser* (⁶); *Newton v. Marsden* (⁷). And there is no distinction in principle between the second marriage of a man and of a woman. By the common law second marriages of all persons are discountenanced and considered bigamy. And by the *Lex Julia* in the old Roman law, a man might impose a restriction upon his widow marrying again, putting her to her election either to abstain from marriage or to lose her legacy; and a woman could impose a similar restriction on her husband. The

(¹) 8 D. M. & G., 756.

(²) 1 Atk., 861.

(³) 9 East, 170.

(⁴) 2 Wh. & T. L. C., 125, 3d ed.;
S. C., 2 Bro. C. C., 481.

(⁵) 1 Moll., 611.

(⁶) 2 H. & M., 190.

(⁷) 2 J. & H., 356.

common law followed the same principle as to second marriages, and by the custom of Gavelkind the husband of a woman who died seised forfeited his freebench if he married again: Viner's Abr., Gavelkind ('); *Low v. Peers* (').

Such a restraint is a very reasonable one, for in the case of a second marriage the interests of the first family have to be considered, and in that view there is no reason applicable to a woman which does not apply with equal force to a man. We say, therefore, that there is neither law, nor authority, nor reason for not extending the rule which establishes the validity of a condition in restraint of the second marriage of a woman to the second marriage of a man.

But in the present case we also contend that the gift in the event of the husband marrying again is an alternative limitation, and not a gift over on forfeiture of the life estate. The gift may not be expressed in skilful language, but if the frame of the will is considered, it is clear that the gift is only a gift to the husband so long as he should remain unmarried; and a limitation over after such a gift would be good even in the case of an unmarried person: *Heath v. Lewis* ('); *Potter v. Richards* ('); *Webb v. Grace* (').

Dickinson, Q.C., and *E. T. Holland*, for R. N. Jackson: With respect to the form of the limitation, the distinction is clearly established between a gift to a man until he does a particular thing, and when he does that thing then over, and a gift to man with a condition forfeiting his estate if he does a particular act. In the latter case, if the thing to be done be against public *policy the gift over is void, although [402 in the former case it may be supported. The distinction may or may not be reasonable, but it is well established, and the courts are bound to uphold it. The present is clearly a condition of forfeiture, and the fact that the testator might have avoided the difficulty by wording the gift otherwise, makes no difference.

With respect to the rule against restraint of marriage, it is useless to conjecture on what ground it was originally founded, or whether the same grounds of public policy may or may not exist now. At the present time there exists a well-established rule that a condition in restraint of marriage forfeiting a previous estate is void, with certain exceptions; and unless the appellants can bring themselves within those exceptions, the court is bound to act upon the rule,

(1) D. 4.

(2) 4 Burr., 2225.

(3) 8 D. M. & G., 954.

15 ENG. REP.

(4) 24 L. J. (Ch.), 488.

(5) 2 Ph., 701.

and not to make fresh law for each case. One of these exceptions is restraint on the second marriage of a woman, which has been recognized in recent cases; but there is nothing in the reasoning of those cases to lead the court to extend the doctrine to the second marriage of a man. And in all the cases in which the restraint of marriage has related to a man the expressions used are perfectly general, and there is nothing to show that the court was referring to men who had been never previously married. In fact, for anything that appears in the reports, some of the cases may have been those of men previously married: *Baker v. White* (¹); *Scott v. Tyler* (¹); *Morley v. Rennoldson* (¹); *Lloyd v. Branton* (¹); *Marples v. Bainbridge* (¹); *Lloyd v. Lloyd* (¹).

Langworthy, for the plaintiff.

JAMES, L.J.: It is somewhat singular that, although something very like the question involved in this case was decided in the case of *Evans v. Rosser* (¹), yet the exact point itself is now for the first time to be decided.

403] *It seems to have been laid down by a great number of cases that what is called a general restraint upon marriage is against the policy of the law. That, of course, can be the only principle which can be the foundation of any rule at all on the subject. The general restraint of marriage, for some reason or other, probably a good reason, is to be discouraged, and a condition subsequently annexed by way of forfeiture to a marriage is therefore void. That is the law both as to man and woman; but it has been most distinctly settled that with regard to the second marriage of a woman, that law does not apply, that whether the gift be a gift to a widow by a husband or a gift to the widow by some other person, the law does not apply to that case, and that such a condition is perfectly valid.

Now, there is no act of Parliament which has provided, and there is no decision of any court whatever which has established, that there is any distinction whatever between the second marriage of a woman and the second marriage of a man; and in the absence of any decision to the contrary, I am myself unable to see any principle whatever upon which the distinction can be drawn between them; and in truth, so far as there is any law at all upon the subject, the most ancient common law perhaps that we have in the coun-

(¹) 2 Vern., 215.

(²) 2 Wh. & T. L. C., 125, 3d ed.

(³) 2 Hare, 570.

(⁴) 3 Mer., 108.

(⁵) 1 Madd., 590.

(⁶) 2 Sim. (N.S.), 255.

(⁷) 2 H. & M., 190.

try, the law of Gavelkind in Kent, has expressly provided that the second marriage of a husband entitled to freebench in his wife's estate is to operate as a forfeiture of that freebench; and it is difficult to understand any principle of public policy which would make that a right thing in Kent and an improper thing in Surrey. The case before us seems to me to show what immense mischief one would be doing if one were to introduce a different rule of law in the case of a widower to that in the case of a widow. Now, in the case of a widow, it has been considered to be very right and proper that a man should prevent his widow from marrying again. Probably, if she were a widow with children, he might think that his children would not be so well cared for and protected if his widow formed a second alliance and became the mother of a second family. That might perhaps have been the origin of the exception, and it was held, when the thing came to be applied, that it might very well apply to a gift by a stranger *who was not the husband. [404] Supposing we had the case of a married woman having a property which she had power to dispose of by her will, and she left it to her husband by reason of his being the widower, and for the purpose of enabling him to perform his duties properly as the head of the family which she may have left, it would, it seems to me, be monstrous to say that when she provided for the contingency of the husband marrying a second time and having a new wife and a new family, she should not be able to say, "In that case he is to lose the estate, and it is to go over for the benefit of my children." In this particular case it was not the wife who was doing it, but it was a person who places herself in the position of the wife—the wife's mother—and who says, making a provision for her adopted daughter, that she gives her the income of her property for her life, and then gives it, after her death, to her surviving husband, evidently in his character of widower, with a declaration that if he should marry again it should go over to the child of the daughter who was the first object she intended to provide for—a most reasonable and proper provision, with respect to which it seems impossible to suggest that there is any ground of public policy against it. On that ground simply, that there is no distinction in principle or authority between the second marriage of a man and the second marriage of a woman, I am prepared to say that the law should be the same as to the one as to the other.

In this particular case it possibly might not have been absolutely necessary to decide that, because, having read

this will over from beginning to end, and looking at the testatrix's own declaration as to what she meant, I cannot bring myself to the conclusion that this was in any respect other than a limitation to the husband while remaining a widower; that it was, in fact, a case of successive limitations. The gift, however, in the first instance, is expressed as a gift to him for life, with a condition defeating it which may bring it within some of the cases, and perhaps we ought not to appear to overrule them without more necessity for doing so. On the first ground, I am of opinion that the gift over on the marriage of a widower is exactly on the same footing as a gift over on the marriage of a widow.

405] *MELLISH, L.J.: I am of the same opinion. The Vice-Chancellor, in giving his judgment in this case, not unnaturally said that he would be making a new law if he held that this gift over was good. I should be sorry to contravene that rule, as far as it is properly applicable, although I may observe that the whole of the rules of equity, and nine-tenths of the rules of common law, have in fact been made by the judges. To a certain extent, I suppose, we have the same authority as our predecessors; but we are limited by this, that where there has been a rule established by our predecessors, we have no right to alter it, and we are bound by that established rule just as much as we should be bound by an act of Parliament. But when what is an established rule of law is sought to be applied to circumstances to which, as far as the authorities appear to go, it has never been applied before, and when the court has to determine whether it is to be applied to this new state of circumstances, then I think the court is entitled to inquire into the principle of the rule, and see whether it comes within the principle or only within the letter of it.

Now, it has been argued that this rule against restraint of marriage is not founded on any principle, that it has nothing to do with public policy, but is a positive rule of law, adopted nobody can tell why, and that because it is a rule of law adopted nobody can tell for what reason, and without any regard to public policy, therefore it is impossible to make an exception to it, and that the court can do nothing with it but carry it out. I cannot agree with that. It may be, no doubt, that in these modern times we should not for the first time establish such a rule; but of course if a rule has been established as a rule of law because it was thought agreeable to public policy and to the interest of the nation at the time it was established, it may be that the courts cannot alter it because circumstances have altered, and that this

must be done by the Legislature. I am not at all convinced that in ancient times there was anything very irrational in the rule that, as applied to unmarried men and unmarried women, conditions of forfeiture which would prevent their marrying ought to be discouraged. It may well have been considered that such a condition was, to say the least of it, a very arbitrary condition, and contrary to the policy *of the nation, which was then thinly populated, and [406 the law would not allow it. It does not appear to me that there is anything very absurd in that.

If, then, that was the rule of public policy, we are to consider how that rule applies to second marriages. It has never been decided that it applies to second marriages. All that is said is that out of some of the cases that occurred there probably are some cases in which you cannot tell from the reports whether the person to whom the rule was applied was married or not, and you must not assume on that account that he was not married. At any rate, the question whether there ought to be any such distinction has never been determined. It appears to me very obvious that if it is regarded as a matter of policy, there may be very essential distinctions between a first and second marriage. At any rate, there is this, that in the case of a second marriage, whether of a man or a woman, the person who makes the gift to the man or the woman may have been influenced by their friendship towards the wife in the one case, and towards the husband in the other. That is to say, regarding the case of somebody in the husband's family, he may make a gift to the husband for life, and then make a gift to the wife because she is the wife of that particular husband, and because he thinks it is more for the benefit of the children that the wife should have the money while the children are young rather than that the children should have it. That may very well influence his mind, and therefore he says, If she marries again I wish the children to have it. It was decided by Lord Hatherley, in the case of *Newton v. Marsden* (¹), for the first time, that not merely a husband but anybody might put that restriction validly on a second marriage of the widow. It appears to me that that was quite as bold a decision as this that we are making, and it is perhaps stronger, because to my mind we must either overrule that decision or carry it to its full extent. I think the cases in reference to a husband are probably likely to be much fewer, that is, cases where the person would be influenced to make a gift to a husband, not because the per-

(¹) 2 J. & H., 356.

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son making the gift has any peculiar affection for the husband, but because he has a peculiar affection for the 407] wife, and wishes to provide for the *wife and the children of the wife, and thinks a gift to the husband is the best mode of carrying out his intention of bounty towards the wife and the wife's children. But such cases will occur, and this obviously is a case of that kind. It is a gift by the testatrix to her adopted daughter; knowing that her adopted daughter had then one child, and probably contemplating that she may have many more, she makes a gift to her adopted daughter, and then to her adopted daughter's husband, and says if the husband marries again it is to go to the children. It seems to me that in no rational way could that ever be considered as against any public policy.

In my opinion, therefore, we are entitled to say that this point, being now raised for the first time, does not come within the principle of the rule which relates to restraints on marriage, although it may come within the letter of the rule as hitherto laid down, and therefore that we ought to hold that the condition in this case is not void.

I do not wish to give my opinion upon the other point, as to whether this was a condition or a limitation.

BAGGALLAY, J.A.: I am of the same opinion. The testatrix in this case has directed her trustees to pay the whole income to arise from her estate unto her nephew Robert Noble Jackson and Ellen Ada Jackson, then his wife, and their assigns, during their joint lives, and after the decease of either of them, then to the survivor for his or her life, with a proviso added, that if Ellen Ada Jackson should depart this life in the lifetime of her husband Robert Noble Jackson and he should marry again, then she directed her trustees and the survivor of them to stand possessed of the said trust moneys and securities upon certain other trusts. This portion of the will, taken by itself, is clearly a gift to the nephew Robert in the event of his being the survivor of himself and wife for life, with a condition imposing that which in terms is a general restraint upon marriage upon a person already married, and therefore in restraint, so far as it operates as a restraint, of second marriage.

Now the present state of the law as regards conditions in 408] *restraint of the second marriage of a woman is this, that they are exceptions from the general rule that conditions in restraint of marriage are void, and the enunciation of that law has been gradual. In the first instance it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a

son making the will in favor of his mother. That, I think, is laid down in Godolphin's Orphan's Legacy (¹). Then came the case before Vice-Chancellor Wood of *Newton v. Marsden* (²), in which it was held to be a general exception by whomsoever the bequest may have been made. Now the only distinction between those cases and the present case is this—that they all had reference to the second marriage of a woman, and this case has reference to the second marriage of a man, but no case has been cited in which a condition has been held to be utterly void as regards the second marriage of a man, and following the analogy of the other cases, there seems no reason at all why a distinction should be drawn between the two sexes as regards this matter. It appears to me that this condition is one which may fairly be treated as valid, and I think so the more for this reason. Here is a gift in favor of a man, which, if he is not deprived of it on the occasion of his second marriage, he may very probably or very possibly settle upon a second wife, and altogether deprive the original family which was the object of the testatrix's bounty.

Upon the second point, whether this provision is to be treated as a condition or a limitation, if the whole will is taken into consideration, and the particular passage which I have read is considered with reference to all that follows, particularly the clause for maintenance and the clause for advancement, I am very much disposed to think it should be treated as a limitation and not as a condition. But it is unnecessary to decide that point.

Solicitors: *Parkers*, agents for *Dalton & Salusbury, Leicester*; *R. J. Child*, agent for *Plumbe, Winchcomb*.

(¹) Page 45.

(²) 2 J. & H., 356.

See 10 Eng. Rep., 829 note; 13 Eng. Rep., 726 note; also *Allen v. Jackson*, 13 Eng. Rep., 564.

L., by her will, gave to her niece B. for her life the interest on a debt due L. of £500. She then said; after the death of B. I give the said sum of money to L. in trust for C., daughter of E., and I request that it be invested in bank stock, and applied by L. for the benefit of C., as he shall think proper. Item: In case the said C. shall die under the age of twenty-one years or marries, I direct that the stock before given for her benefit, be vested in him in trust for E., her mother and M., my great nieces, to be advanced to them in equal proportions, as said L. may think proper, free from the con-

trol of their husbands. At the death of B., C. was married and E. and M. were dead, leaving children. Held, that the bequest to C. is not on a condition in restraint of marriage, but is a conditional limitation; and the bequest over to E. and M. on the marriage of C., is valid: *Selden v. Keen*, 27 Gratt. (Va.), 576.

A condition annexed to a devise to a married woman, that she shall not live with her husband, is in violation of public policy and void. In a devise to a married woman, "upon this condition: if any time subsequent she should conclude not to live with her present husband as his wife, but if she continue so to live as the wife of said husband until her death," then over to

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another, it is held there is nothing in the nature of a condition precedent. The condition being void the devisee takes an estate clear of conditions: *Conrad v. Long*, 33 Mich., 78.

Though a limitation to a widow so long as she remains unmarried, is good, yet if a legacy or bequest of personal property be given to a party for life, with a condition subsequent annexed thereto, that if the legatee marries the legacy is to go over, it seems such condition is bad.

Where a testator directed his execu-

tors to pay annually two hundred dollars of the proceeds of his real estate to his widow, for the support of herself and his children, to be paid monthly, until his youngest son should arrive at the age of twenty-one, provided, however, that his wife remained his widow that long, and in case she again married, the bequest to cease from the day of her marriage; held that the bequest over was void: *Middleton v. Rice*, 6 Penn. L. J. (1 N.S.), 229; *Kennedy, J.*, at *Nisi Prius*, reviewing many cases.

[Law Reports, 1 Chancery Division, 410.]

V.C.H., July 7: C.A., Nov. 22, 23; Dec. 21, 1875.

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*ANDREW V. ANDREW.

[1874 A. 86.]

Will—Life Estate—Estate Tail by Implication—Vested Estate—Executory Devise—Rents undisposed of—Outstanding legal Estate.

A testator, by a will dated in 1832, devised lands to T. during his natural life, and from and after his decease unto his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son then over. The legal estate in the lands was outstanding. T. died leaving an eldest son, a minor.

Held, by Hall, V.C., that the eldest son would, on attaining the age of twenty-one years, take an estate for life, and that the rents and profits in the meantime were undisposed of and went to the heir of the testator:

Held, by the Court of Appeal (reversing the decision of Hall, V.C.), that on the death of T., the eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one years, with an executory devise over in that event to T. in tail.

THOMAS ANDREW, the father, by his will, dated the 29th of October, 1832, devised certain freehold messuages, tenements, and hereditaments and premises in Lancashire unto [411] his natural son, *Thomas Andrew, "to have and to hold all and every the said lands, tenements, and hereditaments, with the appurtenances, situate as aforesaid, during his natural life, subject to the payment of the following annuities and mortgage. And from and after his decease I give, devise, and bequeath the said lands, tenements, and hereditaments unto his eldest son lawfully begotten, if he shall have arrived at the age of twenty-one years, or so soon as he shall arrive at that age; and in default of his having a son, then I give and bequeath the same to the eldest son of my natural son Henry Andrew forever." The testator then gave certain life annuities, and bequeathed his residuary personal estate, but made no residuary devise of real estate.

Thomas Andrew, the father, died on the 25th of November, 1843, leaving him surviving, Thomas Andrew the son, also Thomas Andrew the grandson, the eldest son of Henry Andrew, and leaving his brother George Andrew his heir-at-law. The legal estate in the devised lands was outstanding in the mortgagee.

Thomas Andrew the son had at the death of Thomas Andrew the father no issue, but had afterwards six daughters and a son, the plaintiff Charles James Andrew, who was still a minor.

On the 25th of April, 1868, Thomas Andrew the son executed a disentailing deed (duly inrolled), purporting to convey the devised lands to a trustee to the use of Thomas Andrew the son, his heirs and assigns.

A suit for the administration of the estate of Thomas Andrew the father was instituted by the eldest son, Charles James Andrew, who claimed a life estate, or such larger estate as the court should determine. In opposition to the claim of Charles James Andrew, Amelia Andrew, widow and devisee of Thomas Andrew the son, claimed the estate under the disentailing deed and the will of Thomas Andrew the son; and the devisees of George Andrew the heir-at-law claimed the rents and profits as undisposed of during the minority of Charles James Andrew.

The question was argued before the Vice-Chancellor Hall on the 7th of July, 1875.

Dickinson, Q.C., and *Torriano*, for the plaintiff.

Miller, Q.C., and *Locock Webb*, Q.C., for Amelia Andrew.

**Robinson*, Q.C., and *Bryce*, for the son of Henry [412 Andrew.

Eddis, Q.C., *Cookson*, Q.C., and *Jolliffe*, for other parties.

HALL, V.C.: The first question I have to determine is whether, under this devise, Thomas Andrew took an estate tail in possession. I answer that question in the negative. I consider that Thomas Andrew took an estate for life. The estate is expressly given to Thomas Andrew to hold during his natural life, and such a devise is not to be interfered with unless for some purpose necessary to effectuate what is the clear intention of the testator.

It is said that, upon the construction of the will, the gift to the eldest son when he shall attain twenty-one, and in default of his having a son, amounts to a disposition to Thomas Andrew in tail male, that the words "eldest son," taken in connection with the words "in default of his having a son," are equivalent to a limitation to the heirs of the body. But it is a sound and proper rule of construction

From this decision both Amelia Andrew and the plaintiff appealed, and the appeals now came on to be heard before James, L.J., Mellish, L.J., Baggallay, J.A., and Brett, J.

Miller, Q.C., and *Locock Webb*, Q.C., for Amelia Andrew: We say that Thomas Andrew the son took an estate for life, with a contingent remainder over to his son, if then of the age of twenty-one years, for life, with remainder to 415] Thomas Andrew *the son in tail: *Mellish v. Mellish* ('); *Forsbrook v. Forsbrook* ('); *Parker v. Tootal* (').

The word "son" is often used as a word of limitation: *Doe v. Garrod* ('); *Doe v. Charlton* ('); *Key v. Key* ('). The fact that the legal estate happened to be outstanding can make no difference in construing this will.

Dickinson, Q.C., and *Langworthy*, for the plaintiff: There is no estate tail in Thomas, but a gift over after his death to the son. The words must mean eldest son living at the death of his father. At all events the estate tail is only in remainder and by way of executory devise after the gift of the fee to the eldest son. We say, also, that the estate of the son was vested at the death of the father. Something he must take, and it is a fee vested or contingent; we say vested: *Sugden's Real Property* ('); *Bromfield v. Crowder* ('). It is clear that the testator did not mean to die intestate as to these rents, and the court must decide who takes them. The testator has only provided a gift over in the event of there being no son. We say that the plaintiff has an estate for life or in fee, with an executory remainder in tail to his father: *Doe v. Nowell* ('); *Randoll v. Doe* ('); *Simmonds v. Cock* ('); his estate in fee being liable, no doubt, to be divested in case of his death under age.

Robinson, Q.C., and *Bryce*, for the eldest son of Henry Andrew: We say there is no estate tail in Thomas Andrew the son.

Eddis, Q.C., and *Jolliffe*, for the devisees of the heir: The first gift is to Thomas for life, and the gift to the son, whatever it be, is by way of remainder. That remainder is contingent, and a gap has been left which the testator has not filled up; and even if it is an executory devise, the estate is not vested. There is no case in which a gift on the 416] happening of a contingency has *been held to vest before the contingency has happened. There is nothing in

(¹) 2 B. & C., 520.

(²) Law Rep., 3 Ch., 93.

(³) 11 H. L. C., 143.

(⁴) 2 B. & Ad., 87.

(⁵) 1 Scott, N. R., 290.

(⁶) 4 D. M. & G., 73.

(⁷) Page 286.

(⁸) 1 B. & P., N. R., 313.

(⁹) 1 M. & S., 327.

(¹⁰) 5 Dow., 202.

(¹¹) 29 Beav., 455.

the will to give more than a life estate to the eldest son, nor can the testator have meant to give an estate tail to the father: *Parr v. Swindels* ⁽¹⁾; *Doe v. Gallini* ⁽²⁾. It is clear that until the contingency happens the estate goes to the heir: *Chambers v. Brailsford* ⁽³⁾; *In re Moulem* ⁽⁴⁾.

Miller, in reply.

Dec. 21. JAMES, L.J., now delivered the judgment of the court:

The testator in this case had two natural sons, but no legitimate issue. By his will he recognizes them as his sons, and evidently intended, so far as by law he could, to treat them as if they were his lawful children, the proper inheritors of his estates, and he accordingly divides the bulk of such estates between them and their families.

The portion of his will which we have to construe is that which relates to his son Thomas. [His Lordship then read the words of the will.] His son Thomas, up to and at the time of the testator's decease, was unmarried. He afterwards married, and had issue several children, of whom one only was a son, the infant plaintiff, a child eight years old.

The Vice Chancellor has held that during the minority of that child the estates are undisposed of, so that the rents go during such minority to the heir-at-law.

From that decision the present appeals have been brought, one by the infant, and one by Thomas's widow, claiming under a disentailing deed and a will executed by him.

The case has been very elaborately and ably argued before us. The conclusion which the Vice-Chancellor found himself compelled to arrive at is startling, and is obviously one which the testator could not have intended—which no sane testator could have intended—viz., that during the minority of his son's eldest son, the person especially designated to take the estates, and to be, so far as these particular [417 considerable estates are concerned, the head and representative of the family, he should be left penniless, and the estates should go away during that time from the family of his son to the testator's heir at law for the time being. But of course intestacy is not a matter of intention, and the heir-at-law claims, not because the testator intended him to take in the particular event, and during the particular period, but because, as he alleges, the testator has not expressed his intention as to that event and as to that period.

The question, then, is whether, on the whole context of

⁽¹⁾ 4 Russ., 288.

⁽²⁾ 5 B. & Ad., 621; 3 A. & E., 340.

⁽³⁾ 18 Ves., 368.

⁽⁴⁾ Law Rep., 18 Eq., 9.

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the will, there has or has not been such omission of intention, or whether there is such intention expressed or fairly to be implied.

It must be conceded that the words of gift to the son's eldest son, standing alone and unaffected by any preceding or subsequent context, would have been a mere gift of a future contingent interest. But these words do not stand alone. They are preceded by the life estate to Thomas, and they are followed by the words "and in default of his having a son (in which the word 'his' must, I apprehend, refer to the tenant for life), I give and bequeath the same to the eldest son of my natural son Henry forever."

Now the words, "in default of his having a son," or words of precisely the same import, have been uniformly held to mean that the estates are not to go over so long as there is any male issue, and that the estates are by necessary implication to go to the male issue in regular course of hereditary descent so long as there should be any left. To effectuate this purpose, an estate tail is by necessary implication deemed to be given to the person whose issue are so to take, so that the limitations would stand thus: To Thomas for life; to Thomas's eldest son, if he should have arrived at the age of twenty-one, or on his attaining that age; to Thomas in tail male; remainder to Henry's eldest son in fee.

There is a long category of cases from very early times down to a very recent decision of the Master of the Rolls, in which the words "if," "when," "so soon as," have been held from the context not really to import contingency in the sense of a condition precedent to the vesting, but to mean a proviso or condition subsequent operating as a defeasance of an estate vested. And we should be well warned [418] by the authorities in so dealing with *this case, inasmuch as the limitations were plainly intended to make a complete settlement of the property to a man for life, then to that man's eldest son on his attaining the age of twenty-one, with a remainder over to the other descendants (which would necessarily take effect on that son's dying under the prescribed age), with an ultimate remainder over to another branch of the family.

But all doubt and difficulty are in this case removed by the fact that the gift is actually expressed to be what without the express words we should have implied it to be, viz., that the gift is expressed to be "from and after" the death of the tenant for life.

A man cannot have an estate "from the death" if he is

not to have it for several years after the death, and possibly not at all; and to construe the words as contingent we should have to strike out the word "from," and that in order to make for the testator a most unreasonable will. But taking the word "from" in its natural meaning, and taking the words apparently contingent to have the meaning which has been given to them in so many cases, the whole thing becomes sensible and intelligible.

Arriving at the conclusion that the estate to the son is a vested estate liable to be divested if he should die under the age of twenty-one, that conclusion will dispose of every question now before us; for an indefinite devise, with a gift over in the event of the devisee dying under the age of twenty-one, must be, on principle and authority, a devise in fee. An estate for life would necessarily determine by death at any time, and it would be absurd to attach to such an estate a defeasance in the event of death under the age of twenty-one.

The limitations, therefore, have to be read thus: "To Thomas for life; remainder to Thomas's eldest son in fee, with an executory devise in tail to Thomas, if that son should die under twenty-one." Putting this construction on the will, it is not necessary to consider Mr. Miller's ingenious and able argument that we should make the limitation to Thomas in tail, to be implied from the words, "and in default of his having a son," an immediate estate tail subject only to the estate to the son if and when that estate should arise. That argument assumes that the estate to the son did not vest on the father's death. But we hold that it did so vest.

*The order of the Vice-Chancellor must be discharged, and in lieu thereof a declaration must be made that on the death of Thomas, his son, the infant plaintiff, took an estate in fee in the lands liable to be divested in the event of his death under the age of twenty-one, and that the executory estate contingent on that event is now vested in the defendant Amelia Andrew in fee under the disentailing deed and the will of Thomas Andrew.

Solicitors for plaintiff: *Pitman & Lane.*

Solicitors for defendants: *Bower & Cotton; Gregory & Co.; Milne Riddle & Mellor; F. West.*

[Law Reports, 1 Chancery Division, 419.]

C.A., Dec. 20, 21, 1875.

WORTHINGTON V. CURTIS.

[1872 W. 212.]

Void Policy—Policy effected by Father on his Son's Life—Title to Policy Money—
14 Geo. 3, c. 48—*Advancement.*

A father effected a policy in the name and on the life of his son, in which he had no insurable interest, under circumstances which satisfied the court that he intended it for his own benefit. The son died intestate and the father took out administration to his estate, and the insurance company paid the money assured by the policy to him :

Held (affirming the decision of Bacon, V.C.), that although as between the insurer and the company the policy was illegal and void under the 14 Geo. 3, c. 48, yet, as between the father and the estate of the son, the father was entitled to retain the money for his own benefit.

THIS was an appeal from a decision of Vice-Chancellor Bacon.

The principal question in the suit related to the right to a sum of £500, being the money received in respect of a policy of assurance in the Rock Life Assurance Office on the life of George Curtis the younger, the intestate whose estate was being administered in the suit.

The policy was effected by his father, George Curtis the elder, in the year 1862. The circumstances under which this was done were set forth in the father's affidavit. He stated that he was indebted to his son in a sum of £400, being a legacy bequeathed by his aunt, and that, on his offering to pay the sum, his son demurred to receive it, on the ground that his father had been at great expense in his education and advancement. The affidavit proceeded as follows: "It was ultimately arranged between my said son and me that I should pay to him the said sum of £400, and that in consideration of such payment I should at my own cost and for my own benefit effect a policy of assurance on his life for £500; and in consequence of this arrangement I did, in the said month of April, 1862, pay to him the said sum, and soon afterwards I entered into correspondence with the actuary of the Rock Assurance Company for a policy of assurance on the life of my said son, and received a letter from him which was in the words and figures following," &c.

This letter was dated the 21st of July, 1862. After making an appointment for the attendance of the son at the office, it contained the following sentence: "I inclose you a proposal on own life, also nominee, should that form be

required, and if you will kindly return one of them filled up to me I will apply to his referees, neither of which is required to be of the medical profession."

Mrs. Curtis, the wife of George Curtis the father, also filed an affidavit, in which she stated that she was present at the conversation between her husband and the intestate respecting the insurance of his life, and confirmed the account given of it by her husband.

The Rock office accepted the life of George Curtis the son, and the policy was accordingly effected as a policy in favor of the executors and administrators of the son. It was sent direct to the father, and he regularly paid the premiums out of his own money.

George Curtis the son died in April, 1871, intestate. The Rock office required letters of administration to the son to be taken out. This was accordingly done by his father, and the office then paid the policy money to the father and took his receipt.

The plaintiffs claimed to be creditors of George Curtis the son, and filed the present bill against George Curtis the father for the administration of his son's estate. The Chief Clerk allowed their claim for £550.

When the suit came on for further consideration the *Vice-Chancellor held that the policy moneys be- [421] longed to the father for his own benefit, and from this decision the plaintiffs appealed.

The defendant gave notice that at the hearing of the appeal he should contend, by way of cross-appeal, that the plaintiffs had not established their debt against the intestate's estate.

Jackson, Q.C., and *Dundas Gardiner*, for the appellants: We contend that the proceeds of this policy belong to the estate of George Curtis the son, and not to his father. In the first place, we say that it was from the beginning intended as an advancement for the son. That is the presumption of law in such a case, and here all the probability is on that side. The story about the £400 legacy is evidently an after-thought of the father; its payment could form no consideration for the policy: *Dyer v. Dyer* ('). The payment of the premiums by the father is not sufficient to rebut the presumption of advancement. But, secondly, supposing the father intended the policy for his own benefit, he had no insurable interest in his son's life, and it was void under the 14 Geo. 3, c. 48. It was just that sort of speculation which the statute was intended to prevent.

(') 1 Wh. & T. L. C., 184, 3d ed.

The insurance company might, therefore, have refused to pay the money, but as they have declined to take advantage of the statute, and have paid it to the son's administrator, it ought to be applied as part of the son's estate. It is a mere accident that the father has possession of it; he only holds it as administrator, and must prove his title to it like any other claimant. This he cannot do, because he claims through an illegal transaction: *Wainewright v. Bland* (*).

Kay, Q.C., and *Dickens*, for the defendant G. Curtis the father: If there had been no question as to the statute, the evidence would have been quite sufficient to prove that there was no intention of advancement. The presumption of advancement cannot exist where there is distinct evidence to rebut it; and here both the father and his wife have sworn to the fact that the policy was effected for the benefit of the father. Then, what difference does the statute make? 422] Granted that the policy was illegal, and that *the company might have refused to pay the money, how does that affect the right to the money when paid? A trustee cannot resist the claim of his *cestui que trust* to money in his hands, on the ground that the money is the produce of an illegal transaction: *Lindley on Partnership* (*); *Joy v. Campbell* (*). Here the son was a trustee of the policy for his father; and if his administrator had been a stranger, he must have accounted for the money when received to the father, and could not have set up the statute.

With respect to the cross appeal, we say that no sufficient evidence of the debt was produced before the Chief Clerk.

Jackson, in reply.

Dec. 21. MELLISH, L.J.: This is an appeal from part of an order of Vice-Chancellor Bacon, by which he declared the defendant absolutely entitled to the proceeds of a policy of assurance on the life of George Curtis the son, the intestate in the cause. There has been a notice by way of cross appeal, in which our judgment is asked whether the appellants, who are creditors of the intestate, have made out their debt. Taking this question first, we are all of opinion that there is no reason for thinking that the Chief Clerk came to a wrong conclusion. He had the books before him, and found that the debt was established; and we see no reason to differ from him.

That being so, the question is, whether a policy of as-

(*) 1 Mood. & Rob., 481.

(*) Page 210.

(*) 1 Sch. & Lef., 328, 339.

surance which was effected by the father on the life of his son, and in his son's name, was the son's policy or the policy of the father, who is his administrator, and claims it, not as administrator, but on the ground that he is the person, as between himself and his son, who is entitled to the money.

In the first place, we must consider the question of fact, whether the defendant has given sufficient evidence that as between himself and his son it was really intended that the policy should be for the benefit of the defendant. On that point we have the *defendant's affidavit that he owed [423 £400 to his son on account of a legacy which the defendant had received, and that when he offered to pay it to his son his son demurred to receive it, on account of the expense to which his father had been put in his education. The affidavit then proceeds to state that an arrangement was made between them as follows: [His Lordship read the passage in the affidavit set forth above.] Here he alleges in distinct terms that the policy was effected for his own benefit; and this statement is confirmed by his wife. If the case stood on probability, I should have been of opinion that the father probably intended it for his son's benefit; and that is the presumption of law; but, on the other hand, as it is sworn by the father that he effected the policy on his own account, and this is confirmed by the evidence of his wife, and as for a period of nearly ten years he regularly paid the premiums and kept the policy in his own possession, we think there is no sufficient reason for differing from the conclusions arrived at by the Vice-Chancellor, that as between the father and the son the policy was the property of the father.

It was, however, contended on behalf of the appellants, that, assuming the policy to be the property of the father, it would follow that it was an illegal policy within the statute 14 Geo. 3, c. 48, because, although it was made in the name of the son, the father, who really effected it for his own benefit, had no insurable interest in his son's life. I agree that even if the story told by the father is true as to the expense to which he had been put in his son's education, that gave him no such interest in his son's life as would support the policy; and I am therefore of opinion that the insurance company would have had a good defence under the act if an action had been brought against them on the policy. But although the company had sufficient knowledge of the circumstances to call their attention to the question, they acted as insurance companies usually do, and

never attempted to set up this defence, and when administration to the son was taken out by the father they paid the money without further dispute to him. The question, then, is, whether the money having been so paid, it is part of the intestate's assets, or belongs to the father.

Now the creditors are claiming under the son, and they 424] can *have no greater right to the money than the son had when alive. They claim through him in the same way as executors or trustees in bankruptcy, and have no greater right than the testator or the bankrupt in ordinary cases. This case, therefore, really depends on the question whether, as between the father and the son, the policy belonged to the one or the other. I think it clearly belonged to the father. One test of this is whether, if the son had brought an action of detainue for the policy against the father, he could have recovered it on the ground that the father had no right to it by reason of the statute of Geo. 3? Clearly not. It did not belong to the son but to the father, who had obtained it from the company, and had paid the premiums out of his own money. Again, if the father had wished to surrender it to the company for a valuable consideration, could the son have interfered to prevent him from carrying the surrender into effect? Could he have brought an action for money had and received to recover the amount paid by the company on such a surrender, or could he have maintained a suit in equity to restrain the transaction from being completed? Clearly not. He had nothing to do with it; both the policy and the value of it belonged to the father.

Then the son dies, and the money becomes payable on the policy. Assuming that a creditor, instead of the father, had taken out administration, could he have maintained an action of detainue against the father for the policy? Certainly not. He would have been in the same position as the son before his death, and the son having no property in the policy his administrator would have had no right to it either. Then, supposing the company chooses voluntarily, and without taking advantage of the statute, to pay the money to the father—I say voluntarily, because neither party could have maintained an action against the company—could the administrator of the son have recovered the money from the father? Clearly not.

In my opinion, therefore, there are two reasons for which the appeal must fail. First, because the statute is a defence for the insurance company only, if they choose to avail themselves of it. If they do not, the question who is enti-

tled to the money must be determined as if the statute did not exist. The contract is only *made void as between [425 the company and the insurer. And, secondly, if that is not so, and if the effect of the statute is that the court will give no relief to any party because of the illegality of the transaction, in that case the maxim, *melior est conditio possidentis*, must prevail, and the party who has the money must keep it. On both these grounds, but especially on the first, I think the conclusion of the Vice-Chancellor was right and this appeal must be dismissed with costs.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for appellants: *Travers Smith & Co.*

Solicitors for respondent: *Paterson, Snow & Burney.*

In New York there are *dicta* and cases to the effect that under a general statute forbidding wagers, betting and gaming, a policy issued to A. upon the life of B., the former having no interest in the life of the latter, is void: *Rawls v. American*, etc., 27 N. Y., 282; *Valton v. National*, etc., 20 N. Y., 82, 88; *Ruse v. Mutual Benefit*, etc., 23 N. Y., 516.

An assignment to one, not having an interest in the life of the assured, has been held invalid in Kansas: *Missouri*, etc., v. *Sturges*, 15 Alb. L. J., 496, 6 Ins. L. J., 337.

Otherwise in Rhode Island: *Clark v. Allen*, 15 Alb. L. J., 409, 6 Ins. L. J., 355. See *Hoyt v. New York*, etc., 3 Bosw., 440.

The rule is, undoubtedly, in case of *fire* policies, which are contracts of indemnity only, that a policy in favor of one not having an interest in the property insured is invalid: *Fowler v. N. Y.*, etc., 26 N. Y., 422; *Freeman v. Fulton*, etc., 38 Barb., 247, 14 Abb. Pr., 398.

See *Frink v. Hampden*, 31 How., 83, 1 Abb., N.S., 343.

The only case in New York in which it was held that a policy in favor of one not having an interest in the life insured is void, is *Ruse v. Mutual Benefit*, etc., 23 N. Y., 516, reversing 26 Barb., 556. In that case the court says that such was the rule at common law, and that the statute 14 Geo. III, ch. 48, prohibiting insurance where the party taking the policy has no interest in the life insured, is merely declaratory (see 23

N. Y., 523-7.) The court concedes (p. 525) that Mr. Angell lays down a different rule. The court does not cite, and apparently overlooks the well-considered case of *Dalby v. India*, etc., 15 C. B., 365, 387-8 (where the Exchequer Chamber expressly overruled *Goodhall v. Bolden*, 9 East, 72), and expressly held that (15 C. B., 387), "The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity, for his life—the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same on the other. *This species of insurance in no way resembles a contract of indemnity.*" The court then proceeds to show that fire and marine risks are contracts of indemnity and adds, "But, at common law, before this statute with respect to maritime risks (19 Geo. II, ch. 37) and the 14 Geo. III, ch. 48, as to insurance on lives, it is perfectly clear that all contracts for wager policies, and wagers which were not contrary to the policy of the law, were legal contracts; and so it is stated by the court in *Cousins v. Nantes*, 3 Taunt. 515, to have been solemnly determined in the case of *Lucena v. Crawford*, 2 Bos. & P., 324,

2 N. R., 269, without even a difference of opinion among all the judges. To the like effect was the decision of the Court of Error in Ireland, before all the judges except three, in the *British Ins. Co. v. Magee, Cooke & Alcock*, 182, *that the insurance was legal at common law*. The contract, therefore, in this case, to pay a fixed sum of £1,000 on the death of the late Duke of Cambridge, *would have been unquestionably legal at common law, whether the plaintiff had had an interest therein or not*; and the sole question is, whether this policy was rendered illegal and void by the provisions of the statute 14 Geo. III, ch. 48. This depends upon its true construction. The statute recites, that the making insurance on lives and other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming; and for the remedy thereof it enacts, "that no insurance *shall be made* by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit, or on whose account, such policy shall be made, *shall have* no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever. * * * *This contract is good at common law.*"

The court proceeds (at page 391) to overrule *Goodsall v. Bolden*, 9 East, 72. See the very able and elaborate note, 15 C. B., 393-6.

Since this case the same principle was held in *Law v. Indisputable*, etc., 1 Jur., N.S., 178, 1 Kay & Johns., 223, 228, 230-2.

See *May on Ins.*, §§ 7, 8; *Bunyon on Life Assurance* (2d ed.), 8-10.

In *British Ins. Co. v. Magee (Cooke & Alcock*, 180-2), the court of Exchequer Chamber said, "This writ of error has been brought to reverse the judgment of the Court of Exchequer, in an action of debt on a policy of insurance for £500 upon a life, in which the declaration does not state that the plaintiff below had any interest in the life insured, nor does the policy, which is set out, on oyer, contain such a statement. The defendant below pleaded three pleas, insisting that the plaintiff

had not any interest in the life insured upon which pleas issue has been joined, and three other pleas, insisting that the plaintiff had not any interest to the amount of £500 at the time of executing the policy, or at the death of the life; and another plea stating, that the plaintiff was not damaged by the death to the extent of £500. To these last four pleas the plaintiff demurred generally, and the Court of Exchequer having allowed the demurrers this writ of error is brought to reverse the judgment. The plaintiffs in error have not insisted, on the argument, that the pleas demurred to are good; on the contrary, the note in the paper book confines their case to an attack on the declaration, and accordingly they have only contended that the declaration ought to be held bad on general demurrer, inasmuch as it does not allege that the plaintiff below had any interest in the life insured; in support of which they have relied on the case of *Goodsall v. Bolden* (9 East, 71), as deciding that a policy on a life insurance is a mere contract of indemnity upon which the plaintiff below can only recover to the extent of his loss sustained by the death of the life insured, therefore that he must have an interest in that life.

The counsel for the defendant in error in the first place contended that if it were necessary for the plaintiff to show an interest, this interest sufficiently appeared upon the declaration and policy, and that it was not necessary to allege it more particularly, as from the nature of the policy it is to be implied; and, secondly, they argued that an insurance on a life is a wagering policy, not falling within that class of cases in which certain insurances might be condemned by the common law on the ground of policy or morals, and that in Ireland no such statute had been enacted as the 14 Geo. III, c. 48, which in England has prohibited such insurances unless in cases where the party insuring has an interest. This latter argument has been encountered by an allegation that the insurance is illegal at common law independently of statute, and that the 14 Geo. III, c. 48, Eng., was merely declaratory of the common law. However that has not been sustained, for no authority has been

cited to show that such an insurance has been held illegal, as being against policy or morals in any case decided in England before the statute; and it is only necessary to look into the statute to be satisfied that it is not declaratory, for it does not recite any existing doubt, or prevailing mistake as to the law, but on the contrary recites "that making insurances on lives or other events in which the assured shall have no interest, has been found by experience to have introduced a mischievous kind of gaming;" and then enacts, "that from and after the passing of this act, no insurance shall be made in which the assured shall have no interest. Thus recognizing the frequency of the practice and the necessity for preventing it in future. The court are therefore unanimously of opinion that the judgment of the Court of Exchequer must be affirmed with reasonable costs."

Mr. Bunyon in the second edition of his work upon life assurance (pp. 8-10) meets the objection that it is contrary to public policy to allow A. to have an interest in the death of B., and may lead to poisoning, murders, etc. He says: "The fear of the law is considered quite sufficient to countervail the temptation to assassination (Gilbert v. Sykes, 16 East, 155). * * Other contracts involving such contingencies, and differing little but in form, are, moreover, continually entered into and considered as binding; such are *post obit* securities, in which, in consideration of an immediate advance of money, bonds are given on contingent or reversionary property charged, for the payment of a much larger amount upon the death of a particular person. * * * When we consider the nature of an ordinary life policy, effected for the whole duration of life, and securing a sum of money on an event which will *certainly* happen, it is marvellous that such a contract could ever have been considered one simply of indemnity, by analogy to those of fire and marine insurance.

"It is true that the premium is generally paid from year to year, but it is then so calculated, that the right of renewal rests with the assured, and is a portion of the consideration for which all past premiums have been paid, and the

possibility of the cesser of the insurable interest is not taken into consideration."

Contracts depending upon the lives of third persons, as leases for lives of others, are constantly held legal and valid.

So devises and bequests in reversion, after the termination of a life estate in others, are of daily occurrence.

Insurances by creditors upon the lives of insolvent debtors are concededly legal; the temptation to get rid of them, particularly if in all probability they are to remain worthless, would be as strong as in any other case.

None of these, high and respectable, authorities were referred to by the New York Court of Appeals in *Ruse v. Mutual Benefit, etc.*, 23 N. Y., 516. It is certainly fair to assume that the attention of the court was not called to them or they would undoubtedly have received at least a passing notice from the court.

While the question may be regarded as *res adjudicata* in New York, it may be doubted whether the weight of authority is not against the New York cases.

In a suit on a policy of life insurance procured by the insured for the benefit of another, it is not necessary that the declaration should aver that the beneficiary had any interest in the life of the insured, but a different rule prevails where one procures an insurance on the life of another. In such a case the plaintiff must aver in his declaration that he had an insurable interest in the life insured.

Where a son made an application in the name of his father for a policy of insurance on the life of the father, for his (the son's) benefit, and the agents of the company being aware of all the facts, and that the father knew nothing of the transaction and paid nothing on the policy, still caused the policy to be issued to the father as if procured by him for the benefit of the son, it was held that as a mere question of pleading the company could not be heard to make objection that the transaction was different in fact from what it purported to be by the policy, and that, in declaring on it, the plaintiff was not bound to aver in his declaration that he had an insurable interest

| 1875 | Muskett v. Eaton. | M.R. |
|---|---|------|
| in his father's life: <i>Guardian, etc., v. Hogan</i> , 8 Cent. L. J., 817, Supreme Court, Ills. | a father: <i>Kane v. Reserve, etc.</i> , 3 Weekly Notes Cases, 201. | |
| A policy upon the life of a husband in favor of his wife is valid: <i>Barry v. Equitable, etc.</i> , 59 N. Y., 587. | See also cases cited, 15 Alb. L. J., 3. So in favor of a sister upon the life of a brother: <i>Ætna Life Ins. Co. v. France</i> , 15 Alb. L. J., 450, S. C. at length, 6 Ins. Law Jour., 331, Supreme Court U. S. | |
| So in favor of a son upon the life of | | |

[Law Reports, 1 Chancery Division, 435.]

M.R., Nov. 10, 1875.

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*MUSKETT V. EATON.

[1875 M. 130.]

Will—Estate for Life—Remainder, vested subject to be divested or Contingent—Words, "Who shall attain the age of Twenty-one."

Devise to C. M. for life, and in the event of his leaving a son born or to be born in due time after his decease who should live to attain the age of twenty-one, then to such son and his heirs if he should live to attain twenty-one, with remainder over:

Held, that on the death of C. M. his infant son took a vested estate in the devised property subject to be divested if he should die under twenty-one.

The rule in *Pesting v. Allen* ⁽¹⁾ does not apply to such a case, there being a contrary intention shown in the words "born or to be born in due time after his decease."

LUCY MARTIN, the testatrix in the cause, by her will, dated the 21st of March, 1866, after appointing her nephew Charles Muskett, Charles Eaton and Charles Thomas Muskett, her executors, and giving them each a legacy, proceeded as follows: "I give and devise to Charles Muskett the farm and hereditaments called The Folly for his life, and in the event of his leaving a lawful son born or to be born in due time after his decease who should live to attain the age of twenty-one years, then I give the same farm and hereditaments unto such son and his heirs if he shall live to attain the age of twenty-one years; but in case my said nephew should die without leaving a son who should live to attain the said age of twenty-one years, then I give the aforesaid hereditaments, after the death of him my said nephew Charles Muskett, to George Muskett Eaton and his heirs."

436] *The testatrix died in 1871.

Charles Muskett entered into possession of the farm and hereditaments called The Folly, and died on the 22d of February, 1875, having made a will and appointed Charles Eaton, John Thomas Muskett, and William Muskett Elliot, executors and trustees thereof, and leaving the plaintiff, his only son, an infant of the age of six years.

⁽¹⁾ 12 M. & W., 279.

The plaintiff by his next friend filed his bill against George Muskett Eaton and the trustees and executors of Charles Muskett, deceased, as defendants, praying that the true construction of the said will might be declared. The only point calling for a report related to the construction of the above-stated devise.

Cookson, Q.C., and *Rawlins*, for the plaintiff :

The plaintiff in this case, as the infant son of Charles Muskett, is, under the limitations contained in the will, entitled to a vested estate in the farm called The Folly, subject to be divested in the event of his dying under the age of twenty-one years: *Hawkins on Wills*(¹).

Freeling, for the defendant George Muskett Eaton: The devise in this will of the hereditaments in question was not an executory devise, but a contingent remainder in favor of the son of Charles Muskett on his attaining the age of twenty-one years. This remainder has failed by reason of the particular estate having determined before the contingency happened.

The rule in such cases was established by the case of *Festing v. Allen*(²), where, under a devise to M. J. H. for life, with remainder after her decease to the use of her children who should attain the age of twenty-one years, it was held that M. J. H. was tenant for life, with a contingent remainder to such of her children as should attain twenty-one; and that, as the particular estate had determined by the death of M. J. H. before any of the children attained that age, the remainder failed. The same rule of construction was followed in *Holmes v. Prescott*(³), and *Edgeworth v. Edgeworth*(⁴), and *Bull v. Pritchard*(⁵).

*The result, therefore, is, that the remainder over [437 in favor of George Muskett Eaton takes effect.

Rodwell, for the trustees of the will of Charles Muskett: I contend that the estates limited in remainder after the life estate of Charles Muskett failed, whether in favor of the plaintiff or of the defendant George Muskett Eaton, by reason of the determination of the particular estates, and therefore that the hereditaments passed under the residuary gift.

JESSEL, M.R.: The gift by this will is to Charles Muskett for life, "and in the event of his leaving a lawful son born or to be born in due time after his decease who shall live to attain the age of twenty-one years, unto such son

(¹) Pages 141, 142.

(²) 12 M. & W., 279.

(³) 12 W. R., 636.

(⁴) Law Rep., 4 H. L., 35.

(⁵) 5 Hare, 567.

and his heirs if he shall live to attain the said age of twenty-one years. But in case my said nephew should die without leaving a son who should live to attain the said age of twenty-one years," then follows the gift over.

The question is, whether the words "attain the age of twenty-one years" are part of the description of the devisee, so as to bring the case within the rule laid down in *Festing v. Allen* ⁽¹⁾, where the gift was, in substance, a gift to "such child of A. as shall attain twenty-one." But it cannot be so. It is an immediate gift to the son of Charles Muskett, with a proviso as to his attaining the age of twenty-one years; because the words are, "a lawful son born or to be born in due time after his decease;" and the testatrix must be taken to have known the course of nature, and if the child had been born within nine months after the death of the tenant for life, he could not have been twenty-one at the time when the particular estate determined. It is quite impossible that she could have intended the attainment of the age of twenty-one to be part of the description of the person to take. Therefore, in my opinion, the plaintiff takes a vested estate subject to be divested in the event of his dying under twenty-one; and I so decide.

Solicitors: *Bolton, Robbins & Busk*, agents for *Lancelot Lane, Kenninghall*.

(¹) 12 M. & W., 279.

[Law Reports, 1 Chancery Division, 441.]

M.R., Nov. 27, 1875; Jan. 22, 1876.

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*D'EYNCOURT V. GREGORY.

[1861 D. 89.]

Will—Name and Arms Clause—Use of Surname.

Under a name and arms proviso requiring a devisee to take the testator's surname: *Held*, that adding the testator's surname before his own was not a compliance by the devisee, but that adding the testator's surname after his own was so.

THIS was a suit for the administration of the trusts of the will of Gregory Gregory, dated the 22d of November, 1848. The testator thereby devised his real estate to trustees upon trust, by sale or mortgage, to raise certain sums therein 442] mentioned, and to *convey and assure so much thereof as should not be sold, and the equity of redemption of so much thereof as might be mortgaged, to the uses and upon the trusts and subject to the provisions thereafter expressed, being (subject to certain uses for securing certain

annuities, and to certain limitations which had failed or were spent) to the use of Sir Glynne Earle Welby for life, with remainder to the use of the eldest son of Sir G. E. Welby living at the date of the will for life, with remainder to the first and every other son of such eldest son of Sir G. E. Welby successively in tail male, with remainders over. And the said testator thereby directed that, in the settlement so to be made as aforesaid of his estates thereby devised, there should be contained a proviso or declaration that every person who by virtue of the limitations thereinbefore directed to be contained in such settlement or of the proviso now in statement should become entitled to the possession or receipt of the rents and profits, or to the first beneficial estate of freehold of and in the same estates, or any part thereof, who should not then be called by the name or use the arms of "Gregory," should, within the space of one year next after they should respectively become so entitled as aforesaid, and that the respective husbands of such of the persons becoming entitled as aforesaid as should be females should within one year after their so becoming entitled, or within one year after their respective marriages, in case of their being at that time entitled as aforesaid (as the case might be), assume and take upon himself, herself, or themselves respectively, and use in all deeds, letters, accounts, and other writings wherein or whereto he, she, or they respectively should or might be a party or parties or which they should respectively sign, and upon all other occasions, the surname of "Gregory," and assume, and take, and use the arms of "Gregory" either alone or quartered with his, her, or their own respective family arms. And also should within the said space of one year apply for and endeavor to obtain an act of Parliament or a proper license from the Crown to enable him, her, or them respectively, and his, her, or their respective issue inheritable under the limitations thereinbefore directed as aforesaid, to take, use, and bear the said surname and arms of "Gregory" conformably *to [443 the directions in that his will. And in case any such person or persons, or the husband or husbands of any such person or persons, should neglect or refuse to take and use such surname and arms, and to take such steps as aforesaid for enabling him, her, or them so to do within the said space of one year, conformably to the directions in that his will, or in case any person or persons entitled under that his will to the estates thereinbefore devised in possession, or to the receipt of the rents and profits, or to the first beneficial

estate of freehold therein, and using and bearing the name and arms of "Gregory," should at any time thereafter discontinue the use of such surname and arms, contrary to that his will, or to the proviso or declaration to be contained in the settlement or settlements thereby directed to be made as aforesaid, then and in every such case the estate and interest of the person or persons who or whose husbands should so neglect or refuse or should so discontinue the use of such surname or arms of and in the said hereditaments thereinbefore directed to be settled as aforesaid, and every part thereof, should cease, determine, and become void, and the said hereditaments should immediately thereupon go over to the person or persons next beneficially entitled thereto in remainder under the limitations thereinbefore contained in such and the same manner as if the person or persons who or whose husbands should so refuse or neglect or should so discontinue the use of such surname or arms, being tenant or tenants for life was or were dead, or being tenant or tenants in tail was or were dead, without issue inheritable to his, her, or their estate tail, charged nevertheless with and subject and without prejudice to any lease or leases which should have been previously created of and in the said hereditaments and premises thereby directed to be settled as aforesaid, or any part or parts thereof, by any person or persons entitled as aforesaid, or any part or parts thereof, by any person or persons entitled thereto pursuant to and by virtue of the powers in that behalf respectively hereinafter directed to be contained in such settlement or settlements as aforesaid; but his will was that such cesser and determination of the estate for life of such tenant for life as aforesaid should not operate so as to exclude, defeat, or prejudice any of the executory or contingent estates thereinbefore directed to be limited to his, her, or their sons and 444] daughters, or any other person or persons, *and during the suspense and contingency of such expectant remainder the rents and profits of the said hereditaments which would have belonged to such tenant for life if such cesser and determination had not taken place should be payable unto such person or persons and for such intents and purposes and in such manner as the same would have been payable and applicable for the time being in case such tenant for life had actually been dead, so that immediately from and after such cesser or determination the issue of such tenant for life might have and be entitled to the rents and profits of the said hereditaments thereby directed to be settled during the life of the parent as if such parent

were dead, and that in case and whilst there should not be any such issue in existence the person or persons next entitled for the time being to a vested remainder in the said hereditaments should and might have and be entitled to the said rents and profits for his, her, or their proper use and benefit respectively, but without any exclusion of or prejudice to the estate, interest, or right of any such issue afterwards coming into existence, but only till the time of the birth of such issue respectively.

The testator died in 1854.

Sir Glynne Earle Welby duly assumed the surname and arms of Gregory. He had seven sons living at the date of the will, of whom the eldest was William Earle Welby. He died in August, 1875.

In October, 1875, Sir William Earle Welby obtained the royal license to take and use the surname of Gregory in addition to and before that of Welby; and also to bear the arms of Gregory quartered with those of Welby; and he now presented a petition praying that it might be declared that he had duly complied with the conditions contained in the will of the testator, and might be let into possession of the estates.

Chitty, Q.C., and *Methold*, said that there was no recorded decision as to whether the use of the prescribed surname before that of the person becoming entitled to the estate under the limitations of the will was a sufficient compliance with a name and arms clause framed like the present; but it appeared from a number of *cases [445 collected by the authorities at the College of Heralds to have been generally assumed that it would be.

The MASTER OF THE ROLLS said he was clearly of opinion that the use of the surname of Gregory before that of Welby was not a sufficient compliance with the conditions contained in the will, and he refused the application.

1876. Jan. 22. The petitioner, in December, 1875, obtained a royal license to take and use the surname of Gregory in addition to and after instead of before that of Welby. The petition was amended accordingly, and now came on to be again heard, and an order was made according to the terms of the prayer.

Solicitor: *T. D. Bolton*.

[Law Reports, 1 Chancery Division, 454.]

V.C.M., Dec. 16, 1875.

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*EDWARDS V. EDWARDS.

[1875 E. 77.]

Bill of Sale—Execution Creditor—Possession of Sheriff—Appointment of Receiver nominatim.

Where, on a motion for a receiver, an order is made that a named person on giving security be appointed receiver, the appointment takes effect from the date of the order; and therefore where, after such an order and before the receiver so appointed perfected his securities, certain execution creditors who had not received notice of the appointment put the sheriff in possession of the goods over which the receiver was appointed:

Held, that immediately on notice being given of the appointment the sheriff ought to have been withdrawn.

THIS suit was instituted by bill filed on the 26th of July, 1875, for the purpose of realizing a security consisting in part of an unregistered bill of sale of the trade effects of a printing business.

The plaintiffs were the acting executors under the will, dated the 31st of January, 1870, of Frederick Howarth Edwards, who died on the 17th of December, 1872.

The testator, by a deed of the 1st of July, 1869, sold the business to the defendant for £8,000, together with his interest in the leasehold premises where it was carried on, and the stock-in-trade and effects of the concern; and it was provided that £500 only of the purchase-money should be paid in cash, the rest, with interest, remaining a charge upon the property. By another deed of the same date a debt of £6,500 also owing by the defendant was made a charge upon the property. Neither of these deeds was registered under the Bills of Sale Act.

Default was made in payment of the interest on these sums, the bill was filed, and on the 29th of July, 1875, the plaintiffs, on an affidavit of service of notice, obtained an order which was partly as follows:

"This court doth order that Charles Edward Mason, of No. 30 Essex Street, Strand, in the county of Middlesex, public accountant, upon his giving security, be appointed to receive the rents and profits of the leasehold hereditaments 455] in the bill mentioned, and *to collect and get in the debts now due and outstanding, and other assets, property, and effects belonging to the business in the bill mentioned, and to manage and carry on the said business, and the tenants of the said leasehold premises are to attend and pay their rents in arrear and growing rents to such receiver."

"And it is ordered that the plaintiffs and the defendant do deliver over to the said Charles Edward Mason all the stock-in-trade and effects of the said business, and also all securities in their or either of their hands for such outstanding estate, and all books and papers relating thereto."

"And it is ordered that the said Charles Edward Mason do, out of the first moneys to be received in respect of the said rents and debts and effects, pay the ground or other rents and debts due and to become due in respect of the said business."

For twelve months before the institution of the suit C. E. Mason had superintended the business on behalf of the plaintiffs and other creditors, and was accustomed to attend at the business premises for a short time on most days. The defendant, however, continued ostensibly to carry on the business, and the same course was pursued after the order of the 29th of July, 1875, and no step was taken to give notice to the public or persons dealing with the defendant of the appointment of the receiver.

On the 4th of August, 1875, the sheriff of Middlesex, under a writ of *fi. fa.* issued in an action against the defendant by Francis Lesiter Soper and Reeves Lovell for a debt of £419 5s. 3d., seized the plant and business effects, and thereupon the receiver instructed his solicitor to give notice of his claim to the goods to the attorneys of the plaintiffs in the action, which was done on the following day.

An interpleader summons was then taken out by the sheriff, at the hearing of which Cleasby, B., barred the claim of the receiver without prejudice to any application to the Court, on the ground that the claim was an equitable one.

The sheriff remained in possession till the 23d of August, when he advertised the property for sale. The plaintiffs thereupon, on the 25th of August, applied to the vacation judge *ex parte*, and obtained an order restraining the sale extending over the 1st of September, and on the 14th of September the vacation judge *made a further order [456 in the presence of all parties directing the sheriff to withdraw, on an undertaking by the plaintiffs and the sheriff to deal with the property under the direction of the court.

The receiver completed his securities on the 25th of August, and this fact was certified by the Chief Clerk on the 3d of September.

The execution creditors now moved that the receiver should be ordered to pay their debt, interest, and costs, out of the moneys of the plaintiffs or the defendant in his

hands; or in the alternative, that they might be at liberty to enforce their judgment in the action against the defendant, and that the sheriff might be at liberty to execute the writ of *fi. fa.* against the defendant in due course of law, without regard to the plaintiffs' mortgages in the bill mentioned; or, as a third alternative, that the execution creditors might be at liberty to go in and be examined *pro interesse suo*, and that inquiry might be made what interest they had in the goods, chattels, debts, credits, rents, and profits mentioned in the order of the 29th of July.

Glasse, Q.C., and *Langley*, for the execution creditors: An order appointing a receiver is for the benefit of the parties to the suit, and does not prevent a creditor from going on with his action till the receiver is actually in possession: *Defries v. Creed* (*). In the present case the order was prospective only, appointing Mason receiver when he should have perfected his securities, which did not take place till after the sheriff was put in. There was, therefore, no possession by the receiver which could interfere with the title of the execution creditor. There was no apparent possession by him, and nothing to show that any change had taken place in the relative positions of the parties. The order asked for follows that in *Russell v. East Anglian Railway Company* (*). The object of the Bills of Sale Act was to make such documents absolutely void if not registered, and even the possession by a broker would not be sufficient to defeat the act: *Ex parte Lewis* (*); *Ex parte Hooman* (*); *Ex parte Jay* (*).

457] **Locock Webb*, Q.C., and *Sangster Green*, for the plaintiff: There are two kinds of orders appointing receivers, one when the court refers it to Chambers to appoint a receiver, and the other when the person appointed is named in the order. In the former case a further order is required to complete the appointment. In the latter, he is actually appointed at the time, and all that is required to be done in Chambers is to perfect the appointment by completing the securities. If the order of the court did not appoint Mason receiver, another order was necessary; but it would be contrary to the practice of the court to make a second order: *Seton on Decrees* (*). The moment the sheriff knew of the appointment he ought to have been withdrawn. If Mason was in possession in any capacity before his appointment as receiver, it is unnecessary to inquire when he was appointed.

(*) 34 L. J. (Ch.), 607.

(*) 3 Mac. & G., 104.

(*) Law Rep., 6 Ch., 626.

(*) Law Rep., 10 Eq., 63.

(*) Law Rep., 9 Ch., 697.

(*) 8d ed., p. 1004.

The only question could be whether he was properly appointed.

The agreement here is, moreover, not a document within the Bills of Sale Act: *Brown v. Bateman* (*).

Glasse, in reply: In *Brown v. Bateman* there was not even an agreement under seal, and the question in that case was really as to the right to attach goods to land.

The question here is whether there was any possession by the receiver in that character. If he was not in a position to take money he could not receive the rents, because receiving the rents is taking possession. That a receiver is not the officer of the court till he has completed his recognizances is shown by *Wickens v. Townshend* (*).

MALINS, V.C.: The plaintiffs in this case were in possession of a bill of sale of the trade effects of a business belonging to the defendant, and, the interest being in arrear, a bill was filed to realize the security. On the day the bill was filed I gave leave to serve notice of motion *for a receiver, [458 and, the defendant not appearing, the order was taken on an affidavit of service. As the appointment was made upon service, I must take the defendant as having assented not only to the appointment of a receiver, but to the particular person appointed. It was in effect a consent order.

[His Lordship then read the order, and after referring to the facts above stated, continued:]

It is agreed that when the receiver is once in possession the goods are put out of the reach of the execution creditor. This was the conclusion arrived at in *Russell v. East Anglian Railway Company* (*) after an argument lasting for nine days. If, therefore, the receiver was in possession as from the date of the order, the execution creditors were in contempt in continuing the possession of the sheriff after notice of the appointment, and must pay the costs of the subsequent proceedings. But it is a circumstance in their favor that they did not know of the appointment at the time they took possession.

As to the question when the receiver could be considered as being in possession, I was for a long time impressed with *Defries v. Creed* (*). But the difference between the two cases is, that in that case the receiver was not, as in the present, named in the order. Sometimes there is a reference to Chambers, and there a contest takes place as to which of several persons should be appointed. Where there is such a reference, a further order is required to complete the ap-

(*) Law Rep., 2 C. P., 272.

(*) 1 Russ. & My., 361.

15 ENG. REP.

(*) 3 Mac. & G., 104.

(*) 84 L. J. (Ch.), 607.

pointment. No person is appointed at the time, and there cannot be a receiver till some one is actually appointed such. Now in *Defries v. Creed* the receiver was not even nominated till the 16th of March, and the further order actually making the appointment was not till the 23d of March, and therefore till the latter date there was no receiver, and the execution creditor having taking possession on the 20th of March, the question was whether he had done wrong in disturbing the possession of the receiver. Vice-Chancellor Kindersley, in giving judgment, says ('): "Till Mr. Hedges was actually appointed, he was not in possession as receiver; 459] and it appears to me, therefore, *that the creditor had a full right to proceed to execution;" and he then goes on to refer to the second point in the case by saying: "With respect to the retention of the property after Mr. Hedges' appointment on the 23d of March."

It is clear, therefore, that he decided the case on the fact that there was no appointment of a receiver till the 23d of March.

If that case had turned on the point which Mr. Glasse relied on, that there is no appointment till the receiver gives a satisfactory security, it would apply to the present case. But it would be dangerous to allow it to be said that, when a receiver has been actually appointed by the court, the appointment does not operate till some time afterwards when he perfects his security. The case may go to show that it might not be right for a receiver to receive money, at all events without putting it in a place of security. But though not justified in receiving money, he was justified in taking possession of movable chattels. I am glad to find that the case does not go the length of saying that no receiver can act till he perfects his security.

Now in the present case Mason was appointed on the 29th of July. The defendant was informed of the appointment, and had acquiesced in it and virtually withdrawn from the business. Because, though it is true that there is an affidavit that he was in possession and was performing some acts of ownership, he was not doing anything in derogation of the receivership. For the purpose of taking possession and protecting the business against creditors generally, I think the receiver was in possession, and it was wrong to disturb him; and when the sheriff was informed of the appointment on the 5th of August he ought to have been withdrawn. Though there is no authority exactly in point, I

(') 34 L. J. (Ch.), 608.

think this view is in accordance with the decision of Vice-Chancellor Kindersley in *Defries v. Creed* ⁽¹⁾.

I am of opinion that when an individual is named in the order he is entitled to possession as from the date of the order, and is the officer of the court from that time.

The matter came before Vice-Chancellor Bacon in vacation, and I think the result was that the question was to stand over for me *to decide. I consider Mason as being in [460 possession from the date of his appointment, and the case of the execution creditors consequently fails, and, as they might have come to the court instead of taking out the interpleader summons, they must pay the costs.

Solicitors: *Dod & Longstaffe; Wm. Maynard.*

⁽¹⁾ 84 L. J. (Ch.), 607.

[Law Reports, 1 Chancery Division, 460.]

V.C.M., Dec. 18, 1875.

In re CORLASS.

Gift after Life Interest—Class to take—Period of Gestation—Marriage after Death of Life Tenant.

A testator gave his residuary real and personal estate to trustees on trust to convert and invest, and pay the income to his wife during widowhood, or until his son should attain twenty-two, and then to call in half the money invested and pay it to his son, and as to the other half, to pay the income to the wife during widowhood, and then to his son for life, and afterwards to his lawful issue:

Held, that the children and remoter issue of the son living at his death took together as joint tenants.

One of the son's daughters, who was unmarried at his death, married ten days afterwards, and had a child born six months after her marriage:

Held, that inasmuch as the child, though born within the period of gestation after the son's death, could have had no legitimate existence then, it was not within the class entitled to take.

JOHN CORLASS, by his will, dated the 10th of December, 1834, devised and bequeathed his real and personal estate to trustees upon trust to pay his funeral and testamentary expenses and other lawful claims against him, and after payment thereof to lay out the residue as therein mentioned, and to pay the interest, dividends, and proceeds thereof to his wife Alice until his son William should attain the age of twenty-two years, provided his wife should remain his widow and unmarried up to that time; and when his son attained the age of twenty-two years he directed his trustees to call in one-half the money so invested and pay the same to his son for his absolute use, and pay the interest of the remaining half to his wife so long as she should continue unmarried; and after her death or marriage, which should first

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In re Corlass.

V.C.M.

461] *happen after his son should attain the age of twenty-two years, the testator directed such interest and proceeds to be paid to the son during his life, and afterwards to the son's lawful issue.

The testator died on the 23d of December, 1834. His widow died on the 10th of April, 1845, without having married again. William Corlass attained twenty-two in the year 1850, and died on the 11th of April, 1875.

At the death of William Corlass there were living three children and one grandchild. One of the daughters, Alice Susannah, married George Deveson on the 22d of April, 1875, that is, ten days after the death of William Corlass. She had a child, Alice Maud Deveson, born on the 24th of October, 1875, and therefore within the period of gestation counting from the death of William Corlass.

The one-half of the testator's estate now in question was represented by a sum of £840 1s. 11d., which had been paid into court.

Roxburgh, for a married daughter, her husband, and their infant child born before the death of William Corlass, who now petitioned for payment of the fund out of court: The proper construction of the will is that all the children and grandchildren *in esse* at the death of the person interested for life take as joint tenants, and excluding the child of Alice Susannah, who was not married at the death of William Corlass: *Davenport v. Hanbury* (*).

W. Fooks, for a child of William Corlass who was without children: Lawful issue can only refer to children at all events in the case of a blended fund of real and personal estate, as in the case here. The rule in *Davenport v. Hanbury* does not affect personal estate: *Jordan v. Lowe* (*).

MALINS, V.C.: There is nothing in the point. The fund goes to all the issue who survive the period of distribution, as joint tenants.

462] **Roxburgh*: On the question whether Mrs. Deveson's child can take as a member of the class of lawful issue of William Corlass, the rule as to allowing children to take who are born within the period of gestation after the period of distribution, proceeds upon the assumption that the child sought to be included would, if born when the previous estate ceased, have been capable of taking. It is, in fact, treated as if the birth had actually taken place before the termination of the preceding estate: *Blasson v. Blasson* (*); *Trower v. Butts* (*).

(*) 3 Ves., 257.

(*) 6 Beav., 350.

(*) 2 D. J. & S., 665.

(*) 1 S. & S., 181.

Yate Lee, for the child of Mrs. Deveson: The child was in existence at the death of the tenant for life, as is proved by the fact that the period of gestation had not elapsed before it was born. The court is not at liberty to make any further inquiry than this, namely, Had Mrs. Deveson a lawful child born within the period of gestation? It may be that it would not have been possible to prevent the trustees from distributing the fund if they had wished to do so immediately on the death of William Corlass, but even then there would have been a right to follow the fund. *Blasson v. Blasson* is in favor of this view, because it shows that the rule applies whenever the result of not applying it would exclude a child: *Pearce v. Carrington* (*).

Davenport, for one of the other parties: The case cannot be put higher than that the child must be such as would have taken if actually born when the fund became distributable.

MALINS, V.C.: This case is a very curious one, and there is much to be said on both sides of the question which has been raised.

I have put a construction on the words of the will the result of which is that William Corlass was tenant for life, and after his death the property became divisible amongst his lawful issue *living at his death, and though all [463 his children and grandchildren took shares, they took them as joint tenants, and a child *en ventre sa mère* at the period of distribution would be treated as being in existence for the purpose of sharing in the fund. That has been the rule ever since *Doe v. Clark* (*).

Now in the present case, when Mrs. Deveson's father died she was an unmarried woman but *enciente*, and she married ten days after the death of her father. That the child is a legitimate child is perfectly clear, and is not disputed. But the question is whether it is to be taken as having been *in esse* so as to take a share under this rule. It is clear that the trustees might have distributed the fund, excluding the child, because they could not be bound to wait to see whether the daughter married. But she did marry ten days afterwards, and within the period of gestation, counting from the death of the father, the child was born.

On the whole, I think it is the safer conclusion to say that the child could not have been contemplated as being lawful issue of William Corlass when the fund became distributable. In *Blasson v. Blasson* (*), the lady had a child who, if born within the necessary period previously, would have

(*) Law Rep., 8 Ch., 969.

(*) 2 H. Bl., 399.

(*) 2 D. J. & S., 665.

taken, because she was married at the earlier period. But in this case, if Mrs. Deveson had had a child at the period of distribution, it must have been illegitimate, and not an object of the testator's bounty; therefore, though the child was in fact lawful, it was not so for the purpose of applying this rule.

A child to be capable of taking under this rule must be one who was legitimately begotten before the period of distribution.

Solicitors: *Devonshire; Clarke & Son.*

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1. *Salvage*. In a salvage suit promoted in respect of certain services whereby the defendant's vessel, which at the time such services were rendered was in neither actual nor imminent probable danger, had been safely towed into port:

Held, that such services must be regarded as towage, and not as salvage services. No tender of the amount thereof having been made, such amount could not be recovered in a salvage suit.

2. No claim for demurrage or detention of a ship under warrant of arrest issued by the unsuccessful promoters of a salvage suit can be allowed in the absence of *mala fides* or malicious negligence. *The Strathnaver*. 19

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1. A testator gave his estate by will to trustees in the following words: "I

give, devise, and bequeath all my property over which I have any disposing power." The trusts of the will were for his wife for life for her separate use, and after her death for all his children who should attain twenty-one in equal shares, and upon failure of children for the brothers and sisters of his wife;

Held, that the will must be read *reddendo singula singulis*, and operated as an appointment under two special powers, one of which was a power to appoint among his children subject to a life interest in his wife during widowhood; and the other was a power to appoint a life interest to his wife in a fund which, subject to such power, was held on trust for his children at twenty-one in equal shares. *Thornton v. Thornton*, 509

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1. Where an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein at a valuation by a person named by both parties, and he undertakes the valuation, but if refused permission by the vendor to enter the premises for that purpose, the court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed.
2. The court has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing. *Smith v. Peters*, 463

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ASSESSMENT AND TAXATION.

1. The vestry of a metropolitan parish, having paved a new street, under 18

& 19 Vict. c. 120, s. 105, assessed the London School Board, in respect of a school-house, as being "owners" of one of "the houses forming the street." The school-house did not immediately front the street, but stood back from it some seventy or eighty feet, in a large yard, the whole area being about 29,500 square feet. There was a row of eleven small houses (with gardens at the back of them) between this area and the street; but the only access to the school was by a private passage which ran along one side of the last house and garden into the school-yard, with gates opening from the street in question; the width of the passage being twenty feet and the length about sixty-four feet:

Held, that the school-house, though not actually one of the houses "forming the street," yet practically formed part of it, within s. 105.

2. *Held*, also, that the school board were "owners" within the definition in s. 250 of 18 & 19 Vict. c. 120. *London School Board v. St. Mary*, etc. 182
3. The conservators of the River Thames, who are by statute owners of the river bed, gave permission, by resolution, to the plaintiffs to lay down certain moorings in the river bed, and place a derrick hulk at them, the work to be done to the satisfaction of the conservators and under the inspection of the harbor master, and to remain on certain conditions being agreed to and observed by the plaintiffs. These conditions provided that a certain rent should be paid for the moorings, and specified the purposes for, and the manner in which, the hulk was to be used, and that in all other respects it was to be worked to the satisfaction of the conservators, under the inspection of the harbor master; and the permission was expressed to be granted on the full understanding, on the part of the plaintiffs, that if at any time thereafter it should be found inexpedient to permit the moorings for the derrick hulk to remain in that or any other part of the river, the conservators would, under the powers vested in them by the 91st section of the Thames Conservancy Act, cause the same to be removed. That section provides that no mooring chains shall be put down in the river without the permission of the conservators, and that the conservators may

at any time, by giving a week's notice in writing, require such mooring chains to be removed; and if not removed accordingly, may themselves remove them.

In pursuance of the permission so given, the plaintiffs procured moorings to be laid down, paying for the necessary labor and materials, and placed a derrick hulk at such moorings, which had continued there for some years, and was used by the plaintiffs for the purposes of unloading and reloading coal in the course of their business as coal merchants. The moorings so laid down consisted of anchors and stones, which were laid down in deep holes, dug in the bed of the river, and covered in with large quantities of ballast. The moorings so formed were of a permanent character, and it would have been impossible for the derrick using them to weigh them in the ordinary way in which ships weigh anchor:

Held, reversing the decision of the court below, that the plaintiffs were the occupiers of the moorings, and were liable to be rated in respect of such occupation. *Cory v. Bristol*.

237, 242 note.

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See RENT, 743, 745 note.

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BANKRUPTCY.

1. It is the settled rule in bankruptcy that a partner cannot prove, under a joint commission against his firm, in competition with the creditors of the firm.
2. And this rule applies in a case where the partner had died before the bankruptcy, his share had been taken by the other partners under the provisions of the partnership deed, and the money due in respect of it had not been paid to his executors at the time of the bankruptcy. *Nanson v. Gordon*. 70
3. A person in whom the estate of a bankrupt was, on the annulling of the bankruptcy, vested under s. 81, of the Bankruptcy Act, 1869, having sued for a debt due to the bankrupt, the defendant pleaded a set-off, by way of mutual credit at the time of the bankruptcy, between the defendant and the bankrupt, for unliquidated damages provable in bankruptcy, and which would

have been provable against the bankrupt had the proceedings in bankruptcy continued against him. On demurrer:

Held, that the plea was good, as the vesting order vested the property of the bankrupt in the plaintiff, subject to the right to set off debts which would have been provable in the bankruptcy. *West v. Baker.* 294

4. In August S., a shipbuilder, whose account current with his bankers was overdrawn, offered to give them security upon a ship which he was building. The bankers declined to accept the security then, but said that circumstances might arise to make it desirable that they should have it, and he promised to give it them when they wished it. On the 28th of September the offer was renewed, but the bankers urged him to sell the ship, and so prevent the necessity of their taking the security. On the 7th of October S. had an interview with them at the bank, and they told him that they would accept the security, and that he was to lodge the builder's certificate of the ship with their manager. The next day he signed the certificate, and gave it to the bank manager. The certificate described the ship and her engines, and stated that she had been built for the bank manager. At this time she was not launched, but was in an unfinished state in the builder's yard. The engines were not on board, but were lying unfinished in the yard of the firm who were making them for the shipbuilder. On the 9th of October the shipbuilder had another interview with the bankers, when they told him they could advance him no more money, and did not see how he could go on, to which he assented; but they agreed to advance him £770 to pay his workmen's weekly wages, on the security of an assignment of a debt owing to him from another person, and told him that they could go no further, and that he had better consult his solicitor as to his position. On the 10th of October the manager endeavored to get himself registered as the owner of the ship, but, as she was not launched, this could not be done. But he placed a man in possession of her, and fixed a notice upon her that she was his property. On the 10th of October S. paid his workmen, and then discharged them, and closed his place of business. On the 12th of October he filed a liquidation petition:

Held, that both the securities given to the bankers were valid as against the trustee in the liquidation, there not being in the transactions anything amounting to either a fraudulent preference or an act of bankruptcy:

5. *Held*, also, that the deposit of the builder's certificate created a good equitable mortgage of the unfinished ship, including the engines which were being built for her, but subject as to the engines to any lien for unpaid purchase-money to which the engine-builders might be entitled:
6. *Held*, also, that the assignment of the debt having been given after the insolvent position of S. was disclosed, was a security for the £770 only, and could not be made available by consolidation or otherwise to secure the past debt. *Matter of Hodgkin.* 593
7. A creditor suggested to his debtor that the latter should buy goods on credit from other persons, and should with the proceeds of their sale pay off the debt due to the former. The debtor adopted the suggestion, and out of the proceeds of the sale of goods which he obtained on credit he made several payments on account of the debt. There was evidence that the payments were made under pressure from the creditor. The debtor afterwards filed a liquidation petition:
Held, that, as the transaction was fraudulent in its inception, it was immaterial that the payments were made under pressure, but that they must be set aside as being fraudulent preferences.
8. Where a jury have found a verdict on an issue of fact, but no order consequent thereon has been made by the judge, it is not necessary that an application for a new trial should be made within twenty-one days from the finding.
9. Rule 143 of the Bankruptcy Rules, 1870, does not apply to such a case, either directly or by analogy. *Matter of Reader.* 604
10. An assignment of substantially the whole of a mortgagor's property to secure a previously existing debt and further advances is not an act of bankruptcy, if there is a contemporaneous parol agreement on the part of the

mortgagee to make further advances to a sufficient amount, and such advances are afterwards in fact made, even though the deed contains no covenant or obligation on the part of the mortgagee to make any further advances. *Matter of Winder.* 746

11. One of two partners in trade assigned the whole of his separate assets, and gave a power of attorney to assign all his personal property, as security for a previously existing separate debt. The partnership was at this time insolvent:

Held, that the execution of the deed was an act of bankruptcy, notwithstanding the fact that none of the partnership assets were in terms included in the deed.

12. A bill of sale contained a provision that it should be void in case the mortgagor should pay the principal money thereby secured "upon demand, if and when the mortgagee should so require by a notice in writing," and until payment of the principal should pay interest thereon half-yearly, and also a proportionate part thereof "to the expiration of the said notice, when the same shall be given." And in default of payment power was given to the mortgagee to seize and sell the property comprised in the deed.

13. *Semble*, that the mortgagee was not entitled to seize on the same day on which he made a demand for payment, the demand not being at once complied with. *Matter of Trevor.* 752

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BETTING AND GAMING.

See WAGERS, 264.

BILLS OF EXCHANGE.

See WAGERS, 264.

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See BONA FIDE, 166.
WAGERS, 264.

BONA FIDE.

1. A. being indebted to plaintiff, gave him a check for the amount, payable to plaintiff's order, upon the defendants, a banking company. Plaintiff indorsed his name on the check, and crossed it with the name of his bankers, "London and County Banking Co." The check was stolen and passed for full value to C. C. paid it into his bankers, the London and Westminster Bank; and they presented it to the defendants, who paid it to them notwithstanding the crossing, "London and County Banking Co." Plaintiff brought an action against defendants for a conversion, and for so paying the check, relying on 21 & 22 Vict. c. 79, s. 2, which enacts that a check on a banker, payable to order or bearer and uncrossed, may be crossed by the holder with the name of a banker, and such crossing shall be deemed a material part of the check, and the banker upon whom it is drawn shall not pay it to any other than the banker named in the crossing:

Held (affirming the judgment of the Queen's Bench), that the statute did not affect the negotiability of the check; the plaintiff had indorsed the check, so that C. had become *bona fide* holder of it before it was presented to the defendants, and the plaintiff was not the holder; and there was nothing in the statute to give the plaintiff, who had ceased to be the holder, any right of action against the defendants. *Smith v. Union Bank.* 166

BROKER.

See AUCTIONEER, 408, 421 *note*.

C.

CAPITAL.

See HUSBAND AND WIFE, 607.
LEGACY, 440.

CARRIER.

1. To bring a person within the definition of a "common carrier," he must exercise the business of carrying as a public employment; he must undertake to carry goods for all persons generally; and he must hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire, as a business, not merely as a casual occupation *pro hac vice*.

2. Every ship-owner or master who carries goods on board his vessel for hire is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God or the Queen's enemies.

3. It is not only such ship-owners as have made themselves in all senses common carriers who are so liable; but all ship-owners who carry goods for hire, —whether inland, coastwise, or abroad, outward or inward: all are within the exception to the general law of bailments.

4. Therefore, where the owner of a line of steamers advertised to carry goods from a port within to a port without the realm received goods to be carried for hire upon that voyage, his liability to the ordinary responsibilities of a common carrier according to the custom of the realm was held to attach at whatever period of the voyage a loss might occur.

5. The defendant, who held himself out as a carrier by sea from London to Aberdeen, received from the plaintiff in London a mare to be carried to Aberdeen for hire. In the course of the voyage, —whether within the limits of the realm or without was left uncertain,—the ship encountered rough weather, and the mare, without any negligence on the part of the defendant's servants, but partly by reason of more than ordinary bad weather, and partly by reason of fright and consequent struggling of the mare herself, was injured to such an extent that she died:

Held, that the defendant was liable as an insurer, this not being a loss by

the act of God, not because he was a common carrier, but because he carried the plaintiff's mare in his ship for hire.

6. A damage or loss may be said to have been occasioned by the act of God where it has been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the carrier could not by any amount of ability foresee, or, if he could foresee it would happen, could not by any amount of care and skill resist, so as to prevent its effect. *Nugent v. Smith*. 203, 217 *note*.

See STOPPAGE IN TRANSITU, 667.

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See CRIMINAL LAW.
EVIDENCE.

CONFLICT OF LAWS.

See DOMICIL, 724, 739 *note*.

CONSIDERATION.

1. To action on a bond against the defendant as executor, he pleaded that the plaintiff had seduced and committed adultery with the wife of the defendant's testator, between whom and the plaintiff it was agreed, that in consideration that the defendant's testator would not expose and make public the conduct of the plaintiff, he would not sue on the bond. On demurrer to the plea:

Held, that there was no valid consideration for the agreement, and that the plea was bad. *Brown v. Brine*, 257.

CONSPIRACY.

See CRIMINAL LAW, 316, 328 *note*, 353.

CONSTRUCTION.

See TRUSTS AND TRUSTEES, 563.

CONTEMPT.

See RECEIVER, 846.

CONTRACT.

See AGREEMENT.

CONVERSION.

See REAL ESTATE, 808.

CORPORATIONS.

1. Articles of association contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company for the usual and accustomed fees and charges, and should not be removed from his office unless for misconduct. The articles were signed by seven members of the company, and were duly registered, and the company incorporated under the Companies Act, 1862. The plaintiff was not appointed solicitor to the company by any resolution of the directors, nor by any instrument bearing the corporate seal of the company, but he acted as such for some time. No resolution as to his ceasing to be solicitor was ever passed by the directors, but after a time they ceased to employ him, and employed other solicitors to do the legal business of the company.

The plaintiff brought an action against the company for breach of contract in not employing him as solicitor, to transact their legal business, on the terms of the articles :

Held, by Cleasby and Amphlett, BB., that the articles of association were a contract between the shareholders *inter se*, and did not create any contract between the plaintiff, who was not a party to them, and the company.

2. *Held*, also, by Kelly, C.B., Cleasby and Amphlett, BB., that even if such a contract as the plaintiff alleged had been entered into, it would be a contract not to be performed within a

year, and must, therefore, be in writing, and that the signatures to the articles of association, which were affixed *also intuitu*, were not signatures to a memorandum of the contract within the Statute of Frauds, so as to bind the company. *Eley v. Positive Assurance Soc.* 271, 281 *note*.

3. The directors of a limited company, under the authority of the articles of association, and with the sanction of a general meeting, issued preference capital carrying a dividend at £10 per cent. per annum, payable half-yearly :

Held, on demurrer, that, if the profits of any year were insufficient to pay the dividend in full to the preference shareholders, the deficiency might be made good out of subsequent profits. *Webb v. Earle.* 487

4. Although the court will not interfere with the powers and duties of directors in their management of the internal affairs of a company, directors will be restrained from fixing a particular date for holding the annual general meeting of the company for the purpose of preventing shareholders from exercising their voting powers. *Cannon v. Trank.* 539

5. By the deed of settlement of the A. insurance company it was provided that the funds and property of the company should alone be answerable for claims on the company; provision was also made for enabling the proprietors to dissolve the company, and thereupon the directors were to obtain from some other company an undertaking to pay the claims on the A. company, and were to transfer to that other company a sufficient amount of the assets of the A. company. The A. company was accordingly dissolved, and a portion of its funds was transferred to the B. company, which covenanted to satisfy the liabilities of the A. company. Full notice of this transaction was sent to the policy-holders of the A. company; and in the policies of that company it had been declared that the funds and property of the company should alone be liable to make good the claims under the policy, and the deed of settlement was also referred to. Both companies were wound up, and came under the European Assurance Society Arbitration Acts :

Held, that the A. company had, without the consent of the policy-holders, a right to dissolve itself and transfer its liabilities to the B. company; and that a policy-holder could claim only against the B. company.

6. Per Mellish, L.J.: On such a policy the holder could not have sued the shareholders separately; nor, after the company was dissolved, would there have been any means of compelling the shareholders to pay calls on their shares, the company being unincorporated, and having been formed before the passing of the Joint Stock Companies Acts and the Winding-up Acts; nor had the passing of those acts affected the rights and liabilities of the parties. *Hort's Case.* 762

See DIRECTORS, 1, 18 *note*.
INSURANCE, MARINE, 179.
OFFICERS, 388, 400 *note*.
STOCKHOLDERS, 1, 18 *note*, 388,
400 *note*, 448.

COSTS.

See SPECIFIC PERFORMANCE, 457.
TRUSTS AND TRUSTEES, 492.

COUNSEL.

1. How far payment by trustee, executor, etc., under advice of, a protection. *Matter of Cull's Trusts.* 492

See ATTORNEYS AND COUNSELLORS.
EVIDENCE, 143.
PRACTICE, 176.

CREDITORS.

See SETTLEMENT, 525.

CRIMINAL LAW.

1. *Conspiracy.* Picketing. "watching" and "besetting"—or watching and an-

noying men who may be inclined to work, is an offence within the Workmen's Act of 1875. *Reg. v. Build.* 818, 828 *note*.

2. *Evidence.* The prisoner was indicted in four counts for obtaining money by false pretences from four persons named, the false statements alleged being the same in all these counts; in a fifth count for inserting, with intent to defraud the Queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts and obtaining money thereby. It was shown at the trial that the prisoner had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of carte-de-visite papers, and adding, "Trial paper and instructions, 1s.," and giving an address. Six envelopes were found in the possession of the prisoner on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage-stamps. Two hundred and eighty-one other letters were produced by a post office clerk. These letters had been addressed to the prisoner under the address given in the advertisement, and had been received at the post office like the other letters; but, having been stopped by the post office authorities, none of them had ever been in the prisoner's possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post office before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted in evidence:

Held, that, under the circumstances, the letters were rightly received in evidence. *Regina v. Cooper.* 155, 158 *note*.

3. ———. Where a prisoner was indicted for larceny of certain goods and also for receiving, and the evidence against her consisted of the fact of the stolen property having been found concealed on her person, at about ten o'clock on the morning after the night on which the goods were stolen, and the prisoner made a voluntary state-

ment asserting she had found the goods, the judge directed the jury to acquit the prisoner on the count for receiving, but the jury, notwithstanding, acquitted the prisoner on the count for larceny, but convicted her of receiving, and the judge did not insist on the direction he had previously given, but reserved for the Court for Crown Cases Reserved the question as to whether the evidence was sufficient in law to sustain the conviction on the count for receiving, it was held *per curiam* (Whiteside, C.J., *dubitante*) that the evidence was sufficient to sustain the conviction.

Held also, per Dowse, B., Lawson, J., Morris, J., Deasy, B., Fitzgerald, B., Keogh, J., that whether the judge withdrew his direction as to the count for receiving or not, the evidence being sufficient in law to sustain the conviction, the conviction must stand. *Reg. v. McMahon*. 308

4. ———. Where the deceased person, a constable, in the course of his duty, made, shortly before his death, and in the absence of the accused, a verbal statement in the nature of a report, to his superior officer (an inspector of police), as to where the deceased was going and what he was going to do; such report being material to the case for the Crown:

Held, per Lush, J., after consultation with Mellor, J., that such statement and report were admissible in evidence for the prosecution.

5. In order to prove malice or motive against the accused, the deposition of the deceased against him, taken before the magistrates on another charge, and for which he was afterwards convicted, was tendered in evidence, and

Held, admissible. *Reg. v. Buckley*. 328

6. ———. Witnesses whose evidence had been duly taken at New York by the British Consul General, under the 17 & 18 Vict. c. 104, s. 207, were seamen of a British sailing vessel, which was proved by affidavits to be still at sea, and none of the witnesses were likely to be in the United Kingdom for many months:

Held, that the affidavits sufficiently proved that the witnesses were out of the United Kingdom, their depositions

were read, and the prisoner convicted and sentenced. *Reg. v. Stewart*. 331

7. ———. It was the prisoner's duty, as a time-keeper, to give to a clerk (not the pay clerk) a list of the number of days on which each workman had worked, and it was the clerk's duty to enter these times in the time book and the amount of wages due to each workman according to such returns; and from the time book at the time of paying the wages it was the prisoner's duty to read out aloud the number of days each man had worked, and the wages due, which were then paid to the workman by the pay clerk. The prisoner had wilfully falsified the list by overstating the time one of the workmen had worked, and the false statement was entered in the time book by the clerk, and wages calculated accordingly. On the pay day the entries were read out aloud by the prisoner and the amount of wages so represented paid to the workman. On an indictment against the prisoner for false pretences, the pay clerk was called as a witness, and not remembering the particulars of the entries, he was allowed to refresh his memory by reference to the time book, although the entries were not made by himself, because he saw the entries at the pay time when they were read out by the prisoner, and knew that the prisoner then read the entries correctly and that he, witness, had paid the sums mentioned in those entries:

Held, that the time book was properly admitted to refresh the witness's memory.

8. ———. Parol evidence that a Joint Stock Company (Limited) has acted as an incorporated company is sufficient evidence of its incorporation as a limited company on an indictment for false pretences in which the property obtained is alleged to be the property of the A. B. Company (Limited). *Regina v. Langton*. 366, 370 *note*.

9. *False pretences*. A. was indicted for obtaining goods from several persons by false pretences to whom she had forwarded half bank notes, requesting goods to the value of the entire notes to be sent to her. She had not the corresponding half notes in her custody:

Held, that she was rightly convicted

- for obtaining goods by false pretences.
Reg. v. Murphy. 833
10. ———. Where N. W. was indicted and convicted on an indictment charging that he and others did conspire by false pretences to defraud of large sums of money all such persons as should apply to or negotiate with them for a loan of money, the indictment so framed was held too vague and uncertain in its language to sustain a conviction, which was reversed on writ of error. *White v. The Queen.* 858
11. *Guilty Knowledge.* In order to support a conviction under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17, —by which if any person licensed under the act "suffers any gaming or any unlawful game to be carried on on his premises" he is made liable to certain penalties,—it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that gaming was carried on on his premises.
12. At the hearing of an information against the appellant, an hotel keeper, for suffering gaming on his licensed premises, it was proved that a police constable, about half-past twelve in the morning, was in the street in which the premises were situate. Two of the windows had the blinds up, so that the constable could see three gentlemen, and from what they said it was evident that they were playing cards. He waited for about a quarter of an hour, when the front door was opened by one of the waiters, and he then entered and went up stairs to the room, and found six gentlemen round a table with a quantity of money on it. The manageress of the hotel said that she did not know that they were playing cards, and that they did not have the cards of her, and her statement was confirmed by the card-players, who were in a private room. The appellant having been convicted:
Held, that the case must be sent back to the justices with an intimation of the opinion of the court that, though actual knowledge on the part of the appellant or his servants, in the sense of seeing or knowing of, the card playing, was not necessary to be shown, yet that some circumstances must be proved from which it could be inferred that
- they connived at what was going on.
Booley v. Davies. 199, 202 note.
13. *Indecency.* The prisoners were indicted in one count for keeping a booth for the purpose of showing an indecent exhibition; in a second for showing for gain an indecent exhibition in a booth; in a third for showing an indecent exhibition in a public place. It was proved that during the Epsom races the prisoners, who were travelling showmen, kept a booth on Epsom Downs for the purpose of an indecent exhibition, that they invited people to enter, and that those who would pay entered and saw an indecent exhibition:
Held, that the prisoners had committed an indictable offence, and that it was well laid in the indictment. *Regina v. Saunders.* 151
14. *Larceny.* Prosecutor asked prisoner if he could get bills of exchange discounted, and prisoner replied that if prosecutor was a person of credit he could get his discounted. Three bills were then drawn by prisoner payable to his order, which prosecutor accepted, and delivered to the prisoner to get discounted. The proceeds of the discounting were to be handed to the prosecutor, less the prisoner's commission, or the bills to be returned. The prisoner being pressed by a creditor for a debt of £62 gave one of the bills (being for £200) in payment, representing it as his own bill, and asking the creditor to discount the balance of the bill. The creditor declined to discount the balance, and the bill was not indorsed upon the condition of the creditor's discounting the balance. The jury found that it was the prisoner's intention, when he indorsed the bill, to pass the property in it absolutely to the creditor:
Held, that upon these facts, the prisoner might properly be convicted of larceny as a bailee of a bill of exchange under 24 & 25 Vict. c. 96, s. 3. *Regina v. Oxenham.* 373, 378 note.
15. *Libel.* The court will not sanction applications for criminal information in cases of alleged libel if resorted to for the purpose of extorting an apology.
16. All excuses for the publication of a libel, as accidental error, inadvertence,

- and such like, should be promptly made.
17. It is not enough to say we were "misled," nor is "personal malice" material. To repeat a malignant scandal floating about society, although with no intent to injure any person in particular, is sufficient to support a criminal information.
18. A libel of a serious character being brought before the court, it will not sanction a compromise between the parties, but the prosecution once instituted must take its course; the object of such a proceeding being not the vindication of character, but the repression of scandalous libels. (Per Cockburn, C.J.)
19. In future, the court will lay down a stringent rule, that in such cases the counsel who applies for a criminal information shall give an undertaking on the part of the prosecutor to proceed with the prosecution in order to ensure its being carried to its legitimate conclusion. *Regina v. The World*. 340
20. ———. Where, on an application to discharge a conditional order for a criminal information for libel, it appeared from the affidavits that the prosecutor was land agent over a large estate, and had raised rents and harshly treated the tenantry on the estate, and his conduct was criticised by the defendant in the alleged libels, which were published in a newspaper, and the prosecutor imputed bad motives and made accusations against the defendant in his affidavit, it was held that, although the court would refuse to grant the information had the libels merely been an imputation on the private character of the prosecutor, yet that as the alleged libels justified a previous attempt to assassinate the prosecutor, and pointed at his being eventually assassinated, the court would refuse to discharge the conditional order. *Regina v. Casey*. 345
21. *Malicious Mischief*. On an indictment under 24 & 25 Vict. c. 97, s. 40, for unlawfully and maliciously killing, maiming and wounding a mare, it was proved that the prisoner caused the death of the mare through injuries inflicted by his inserting the handle of a fork into her vagina, and pushing it into her body. There was no evidence that the prisoner was actuated by ill-will towards the owner of the mare, or spite towards the mare, or by any motive except the gratification of his own depraved taste. The jury found that the prisoner did not, in fact, intend to kill, maim, or wound the mare; but that he knew what he was doing would or might kill, maim, or wound the mare, and nevertheless did what he did recklessly and not caring whether the mare was injured or not. The jury convicted the prisoner:
Held, that there was sufficient malice, and that the conviction was right.
Regina v. Welch. 159, 160 note.
22. *Manslaughter*. By 31 & 32 Vict. c. 122, s. 37, "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been, or shall be likely to be, seriously injured, he shall be guilty of an offence punishable on summary conviction."
- Upon the trial of an indictment for manslaughter it was proved that the prisoner was the father and had the custody of an infant child. The child was ill and wasting for eight or nine months from chronic inflammation of the lungs and pleura, and then died. The prisoner belonged to a sect who never call in medical advice, but call in the elders of their church to pray over the sick person. This course was pursued with the prisoner's child. The prisoner, however, who had no medical skill himself, consulted the person called in to pray over the child, who also had no medical skill, and they thought the child was suffering from teething, and gave it articles of diet which they thought suitable for a child so suffering. The prisoner had sufficient means to procure skilled advice, which was easily obtainable. The jury found on evidence, which, it was to be taken, was sufficient to warrant their findings: first, that the prisoner neglected to procure medical aid for the child when it was in fact reasonable so to do, and when he had the ability; secondly, that the death was caused by that neglect; thirdly, that he *bona fide*, though erroneously, believed that medical aid was not required for the child; fourthly, that he

bona fide believed that it was wrong to call in medical aid. The learned judge thereupon directed a verdict of guilty to be entered :

Held, without expressing any opinion as to how the case would have stood at common law apart from the above statute, that that statute imposed a positive duty to provide adequate medical aid when necessary, and that that duty having been wilfully neglected by the prisoner, and death having ensued from that neglect, the prisoner was properly convicted of manslaughter. *Regina v. Downes*. 161, 166 *note*.

23. *Resisting officer*. Where goods were seized under a warrant of the high sheriff addressed to a special bailiff, grounded on a writ of *fi. fa.* from one of the superior courts, which warrant conferred no authority on the special bailiff to employ assistants, and the goods were rescued from the custody of the assistants, it was held that an indictment was not sustainable for "by violence and threats of violence, compelling" the special bailiff to abandon the seizure of the goods (*Morris, C.J., Keogh, J., and Lawson, J., dissentientibus*). *Regina v. Noonan*. 387

See EVIDENCE.
HIGHWAYS, 146.

CUSTOM.

See EASEMENT, 254.

D.

DE BENE ESSE.

See CRIMINAL LAW, 331.

DEBTOR AND CREDITORS.

1. Where, in the case of a deficient estate, the creditors have been ascertained, and the available assets divided amongst them, and at a subsequent period further funds come in belonging

to the estate, and some only of the creditors or their representatives appear in answer to advertisements, those who so appear are only entitled to the proportions of the fund distributable which their debts bear to the entire liabilities of the estate, and the remainder must be retained to meet any future claims by the other creditors. *Ashley v. Ashley*. 720

DELIVERY.

See STOPPAGE IN TRANSITU, 667.

DEMURRAGE.

See ADMIRALTY, 19.

DESCRIPTION.

See WILL, 649.

DEVISE.

See TRUSTS AND TRUSTEES, 563.
WILL.

DIRECTORS.

1. *De facto* ; number required to act. 18 *note*.
See STOCKHOLDERS, 1, 18 *note*, 624.
CORPORATIONS, 539.
OFFICERS, 388, 400 *note*.

DISCOVERY.

1. The Court of Chancery has not only full power to stay all proceedings in a suit till the plaintiff has made a discovery which it has called upon him to make, but, if not satisfied that its order has been properly obeyed, may dismiss the suit itself; and where

money has been paid into court, may direct the payment of that money out of court to the party entitled to it.

Per LORD HATHERLEY: When any step ought to be taken in a cause, which, in the judgment of the court, is necessary in order to facilitate the decision of the cause, and default is made, the party in default, if plaintiff, is liable to have his bill dismissed. And this is not a matter of first impression. *Republic of Liberia v. Roye.* 44

See FOREIGN SOVEREIGN, 690, 693 note.

DISTRIBUTION.

See DEBTOR AND CREDITOR, 720.

DIVIDENDS.

See CORPORATIONS, 487.

DOMICIL.

1. A peer of the British Parliament is not, by reason of his obligation to attend the House of Peers whenever his presence there is required, incapacitated from acquiring a domicile of choice in a foreign country.

A *de facto* domicile governing the succession to personal property of which he dies intestate may be acquired in France by a foreigner who has not obtained the government authorization imposed by the Code Napoléon, Art. 18, as the condition for enjoyment by a foreigner resident in that country of full civil rights. *Hamilton v. Dallas.* 724, 739 note.

E.

EASEMENT.

1. A custom for the inhabitants of a parish to enter upon certain land in the parish, and erect a maypole thereon,

and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any time in the year, is good. *Hall v. Nottingham.* 254

See INJUNCTION, 443.
WAT, 788.

EJECTMENT.

1. To trespass for meane profits the defendants pleaded title to the lands in themselves during the time for which meane profits were claimed. The plaintiff replied, by way of estoppel, as to so much of the meane profits as had accrued since a certain day named, that he sued out a writ of ejectment, for the purpose of recovering possession of the lands, wherein he claimed to be entitled from such day, and that thereupon such proceedings were had that he recovered the lands and possession of them. On demurrer:

Held, that the judgment in ejectment did not operate as an estoppel with respect to the duration of the plaintiff's title, and the replication was therefore bad. *Harris v. Mulken.* 282

ELECTION.

See REAL ESTATE, 803.

ELECTIONS, CORPORATE.

See CORPORATIONS, 539.
DIRECTORS, 1, 18 note.
OFFICER, 388, 400 note.
STOCKHOLDERS, 634.

EMINENT DOMAIN.

1. The provisions of 35 & 36 Vict. c. 102, s. 106, requiring one month's notice to be served before instituting any proceeding against the Metropolitan Board of Works or any district board in respect of anything done or intended to be done under their parliamentary

powers, do not affect the right of a riparian owner, whose stream is being polluted by the drainage works of a district board, to summary relief by injunction.

2. The authority over sewers, and the drainage powers given by Parliament to local boards, do not authorize the committal of a nuisance by the boards in their exercise of such powers. *Attorney-General v. Hackney Local Board*. 520.

EN VENTRE SA MERE.

See WILL, 528.

EQUITY.

See PARTNERSHIP, 494.

ESTATE TAIL.

See LIFE ESTATE.

ESTOPPEL.

See EJECTMENT, 282.

EVIDENCE.

1. Remarks of the LORD CHANCELLOR showing that in considering circumstantial evidence all the circumstances must be examined and compared to establish the required elucidation.
2. In dealing with circumstantial evidence, the court derives much aid from the opposing criticisms of counsel. *Belhaven Peerage*. 143
3. When letter not received by prisoner evidence against him. *Reg. v. Cooper*. 155, 158 note.
4. When confession to detective not known to be such, admissible. 158 note.

5. When, though defendant intoxicated. 158 note.

6. When and how witness may use memoranda to refresh memory, and when not. *Regina v. Langton*. 366, 370 note.

See CRIMINAL LAW, 199, 202 note, 308, 320, 331.

PRESUMPTION OF DEATH.

EXECUTION.

See STAY, 622.

EXECUTORS AND ADMINISTRATORS.

1. How far payment under advice of counsel is a protection. *Matter of Cull's Trusts*. 492
2. How far may continue business, how far imperils general assets of estate and how far personally liable. 508 note.

See RENT, 743, 745 note.
SET-OFF, 525.

EXECUTORY DEVISE.

See LIFE ESTATE.

F.

FALSA DEMONSTRATIO.

See WILL, 649.

FALSE PRETENCES.

See CRIMINAL LAW, 333, 335.

FAMILY SETTLEMENT.

See MISTAKE, 552.

FERRY BOAT.

See ANIMALS, 208, 217 *note*.

FOREIGN LAW.

See DOMICIL, 724, 739 *note*.
LEX LOCI, 299, 307 *note*.

FOREIGN SOVEREIGN.

1. An original bill was filed by a foreign republic, and a cross bill was filed by one of the defendants against the republic and one of its officers, made a defendant for the purpose of discovery:
Held (reversing the decision of *Malins, V.C.*), that the court would not order proceedings in the original suit to be stayed until the officer of the republic had appeared.
2. *Semble*, that the suit might be stayed until the republic had named a proper person to give discovery.
3. *Semble*, that the rule is the same in the case of a corporation. *Republic of Costa Rica v. Erlanger*. 690, 693 *note*.

FORFEITURE.

See STOCKHOLDERS, 1, 18 *note*.

FORMER SUIT.

See EJECTMENT, 282.

FRAUD.

See BANKRUPTCY.
 HUSBAND AND WIFE, 760, *note*.
 MISTAKE, 552.
 REFORMATION OF CONTRACTS, 536.
 STOCKHOLDERS, 676.

FRAUDS, STATUTE OF.

1. A sale of growing timber to be taken away as soon as possible by the pur-

chaser is not a contract or sale of land, or any interest therein, within the 4th section of the Statute of Frauds.

2. The defendant by word of mouth purchased certain growing trees for £26 of the plaintiff on the terms that he, the defendant, should remove them as soon as possible. The defendant accordingly cut down some of the trees and agreed to sell the tops and stumps to a third person. The plaintiff then countermanded the sale, and prohibited the defendant from cutting down the rest of the trees. The defendant, however, cut down the remainder, and carried the whole away:

Held, that the case was within the 17th section of the Statute of Frauds, and that before the sale was countermanded there was an acceptance and actual receipt of part of the goods sold within that section. *Marshall v. Green*. 218, 227 *note*.

3. An agreement to sell property to the plaintiff was signed for a company by the secretary, who was alleged to be their authorized agent. The agreement was made subject to conditions of sale, and it was alleged that the vendors therein described referred to the company. The conveyance was prepared for execution when the company was ordered to be wound up, and the liquidator repudiated the contract on the ground that the secretary was not an authorized agent for the purpose of sale:

Held, on demurrer, that the allegations in the bill were sufficient to show that the secretary was the authorized agent for the purpose of executing the contract, both within the Statute of Frauds and the Companies Act, 1867.

4. *Semble*, that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the Statute of Frauds. *Beer v. London, etc., Co*. 408, 421 *note*.

See CORPORATIONS, 271, 281 *note*.

FREIGHT.

See INSURANCE, MARINE, 82.

FUND.

See DEBTOR AND CREDITOR, 720.

G.

GUILTY KNOWLEDGE.

See CRIMINAL LAW, 199, 202 *note*.

H.

HEARSAY.

See CRIMINAL LAW, 328.

HIGHWAYS.

1. By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 72, if any person shall "wilfully obstruct the passage of any footway," he is made liable to a penalty of 40s. The respondent was summoned under s. 72, for obstructing a way. Evidence was given that trees and underwood on his land had grown over and across the way, so as to be an obstruction to the free passage along it:

Held, by Mellor and Quain, JJ. (Cockburn, C.J., dissenting), that the respondent, in merely suffering the trees to grow so as to be an obstruction, did not "wilfully obstruct" the way within s. 72. *Walker v. Horner*. 146

See NEGLIGENCE, 171, 252 *note*.

HOTCHPOT.

See POWER, 708.

HUSBAND AND WIFE.

1. A lady, possessed of about £12,000 consols, being engaged to be married,

a draft settlement in the usual form was submitted to the intended husband, who objected to some of its provisions, and insisted that if there should be "no children," and he should survive his wife, the fund should belong to him. Articles embodying this provision were hastily signed before the marriage; and after the marriage, the fund having been transferred to the trustees, a draft settlement, in execution of the articles, was prepared, but objected to by the husband, and, as ultimately executed, contained limitations to the husband and wife and the survivor for their lives, and as to the capital to the children of the marriage absolutely, not to such as should attain twenty-one or marry, and without any limitation over, in the event of the death of a son or of an unmarried daughter under twenty-one. There was also a provision that "if there should be no child" of the husband and wife, and the husband should survive the wife, the fund should belong to him; but the deed contained no alternative limitation in the events of there being no child, and of the wife surviving the husband. The husband brought no property into settlement.

In the event, one child was born, but died an infant in the lifetime of both parents. The husband died; and his representative claiming the fund, subject to the widow's life interest—upon bill by the widow for rectification of the settlement, and for a declaration that she was entitled to the fund:

Held, that the transfer of the fund to the trustees was not a reduction into possession by the husband:

2. *Held*, also, that the settlement was not in accordance with the articles, and that it ought to be rectified; and that, in the events which had happened, the plaintiff was entitled to the fund:
3. *Held*, also, that the plaintiff was entitled to arrears of income due at the death of the husband. *Cogan v. Duffield*. 607
4. A husband and wife, at a time when the wife was under age, executed a deed which purported to convey freehold property of the wife to a purchaser for £500. The deed was not acknowledged by the wife. The husband received the £500. The pur-

chaser afterwards contracted to sell the property, and his sub-purchaser required the concurrence of the wife in the conveyance to him. The wife, who was then of age, refused to concur, unless the husband would execute a bill of sale of his furniture to a trustee for her, to secure the payment of £425 for her separate use. This was done by the husband; and she then executed the conveyance to the sub-purchaser. The bill of sale was registered. Possession of the furniture was given to the trustee by delivering to him a silver fork in the name of the whole, and the keys of the house where the furniture was. But the furniture remained, until the husband filed a liquidation petition, in the house which was occupied by him and his wife, and it was used by them:

Held, that the execution of the bill of sale amounted to a purchase of the wife's concurrence in the conveyance; that the possession was consistent with the terms of the deed; and that the wife's trustee was entitled to the furniture as against the trustee under the liquidation. *Matter of Coz.*

756, 760 *note*.

5. When dealings between, payment for release of dower, settlement of difficulties between, valid and when invalid.

760 *note*.

See SETTLEMENT, 525.

I.

ILLEGAL AGREEMENT.

See CONSIDERATION,
WAGERS, 264.

ILLEGAL RESTRAINT.

See LEGACY, 815, 828 *note*.

ILLEGITIMATE CHILDREN.

1. A testator, in 1889, gave property to trustees in trust to pay the income to

his "daughter A., the wife of J. H.," for life, and to divide the principal between all the children of his daughter A. when they should attain twenty-one in equal shares, and in case all the children of his daughter A. should die under twenty-one without issue there was a gift over in favor of a son. For some time prior to the date of the will and the death of the testator in 1840, J. H. and the daughter A. were living together as man and wife at B., where the testator resided until within a few months of his death. They were married in 1845. Three children were born before the marriage—one before the testator's will and two after his death. One child was born after the marriage:

Held, that the legitimate child only was entitled to the bequest. *Ayles's Trusts, Matter of.* 741

INTENT.

See GUILTY KNOWLEDGE, 199, 202 *note*.

IN VENTRE SE MERE.

See LIFE ESTATE, 851.

INCOME.

See HUSBAND AND WIFE, 607.
LEGACY, 440.
LIFE ESTATE.

INDEFINITENESS.

See SPECIFIC PERFORMANCE, 457.

INDICTMENT

See CRIMINAL LAW, 353.

INFANTS.

See MAINTENANCE, 705, 711.

INJUNCTION.

1. The owner in fee of a garden over which the tenants of his adjoining houses had rights of enjoyment and management:

Held, entitled to an injunction to restrain continuing trespasses involving nuisances in the garden committed by a person acting under color of a contract to improve the garden entered into between him and the tenants. *Allen v. Martin*. 443

See CORPORATIONS, 539.
EMINENT DOMAIN, 520.
LIGHT, 436.
NUISANCE, 480.

INSURANCE, LIFE.

1. A father effected a policy in the name and on the life of his son, in which he had no insurable interest, under circumstances which satisfied the court that he intended it for his own benefit. The son died intestate and the father took out administration to his estate, and the insurance company paid the money assured by the policy to him:

Held (affirming the decision of Bacon, V.C.), that although as between the insurer and the company the policy was illegal and void under the 14 Geo. 3, c. 48, yet as between the father and the estate of the son, the father was entitled to retain the money for his own benefit. *Worthington v. Curtis*. 832, 837 note.

2. Whether one who has no interest in a life can insure it. 837 note.

See CORPORATIONS, 762.

INSURANCE, MARINE.

1. Shipowner and charterer may agree, by the terms of a charterparty, that a portion of the stipulated freight shall be prepaid; and such prepayment will not affect its legal character of freight; the remainder may be the subject of insurance by the shipowner.

2. A ship was chartered to sail from Greenock to Bombay, to carry a cargo of coals. Freight was to be paid on un-

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loading and right delivery of the cargo at and after the rate of 42s. per ton of 20 cwts. on the quantity delivered. It was provided that "such freight is to be paid, say one half in cash on signing bills of lading less four months' interest at bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on London at six months' sight." Half of the estimated amount of the freight was paid in London. The shipowner effected two insurances, one for £500 "on freight valued at £2,000," the other for £700 "on freight payable abroad valued at £2,000." The ship was lost before entering Bombay harbor, but one half of the cargo was saved and delivered. The master, in the belief that the prepayment had satisfied the freight on this half so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight:

Held, that on the proper construction of the policy the whole sum agreed upon constituted freight; that half of the whole sum of that freight had been paid in England; that it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; that half of the whole remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea, and that the shipowner was entitled on his policies on freight to recover as for the total loss of that half. *Allison v. Bristol, etc.* 82

3. The manager of a mutual insurance association cannot maintain an action for contributions due under the rules from any member, although those rules have been agreed to by the member and profess to give such a power.

4. Declaration that the defendant was a member of a mutual insurance company and caused himself to be insured in respect of a vessel for a certain time, and that the plaintiff, who was manager of the association, in consideration that the defendant agreed to comply with certain rules which it was agreed between the plaintiff and defendant

should form part of the policy, subscribed the policy on behalf of the several members of the association, every member bearing his equal proportion according to the sums mutually insured therein. The declaration set out the rules, which provided how the amount of contributions to be paid by members should be ascertained, and that the manager should have power to sue for the amount due from any defaulting member. Averment that certain contributions became due which the defendant did not pay. On demurrer:

Held, that the action could not be maintained: for that the plaintiff signing on behalf of the members did not take upon himself any liability, and therefore there was no consideration, as between the plaintiff and defendant, for the promise of the defendant. *Evans v. Hooper*. 179

5. A vessel insured "from Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival," arrived safely at Newcastle, and completed the discharge of her inward cargo. Being chartered to carry a cargo of coals to Gibraltar, she received a small quantity as stiffening, and was moved to a loading-place on the river Tyne, within the port of Newcastle, to complete her loading. While moored there the vessel, within fifteen days from her original arrival at Newcastle, was injured in a storm. The stamp on the policy was sufficient to cover both a voyage and a time policy:

Held (by Kelly, C.B., and Amphlett, B.; Cleasby, B., dissenting), that the substantial purpose of the insurance being at an end when the loss occurred, the underwriters were not liable. *Gambles v. Ocean Ins. Co.* 280

6. An underwriter who has subscribed an insurance "on goods" may reinsure by the same description, and the policy need not be expressed to be a reinsurance. *Mackenzie v. Whitworth*. 286

INTENT.

1. Meaning of "intentionally." 160, *note*.
2. When gist of offence must be proved as laid. 161, *note*.

See CRIMINAL LAW, 199, 202 *note*, 328.

INTOXICATION.

See EVIDENCE.

J.

JOINT CREDITORS.

See SET-OFF, 467.

JOINT DEBTORS.

See LIMITATIONS, STATUTE OF, 572, 582 *n*.

JOINT LIABILITY.

See LIMITATIONS, STATUTE OF, 572, 582 *note*.

PARTNERSHIP, 494, 637.

JOINT AND SEVERAL LIABILITY.

See PARTNERSHIP, 494, 637.

JOINT STOCK COMPANIES.

See CORPORATIONS, 762.

JUDGMENT.

See STAY, 622.

JURISDICTION.

1. An action of debt having been brought for arrears of a rent-charge upon lands in Australia prior to the commencement of the Judicature Act:

Held, affirming the decision of the court below, that the venue in such ac-

tion was local, and that it could not therefore be maintained in this country. *Whitaker v. Forbes.* 234, 236 note.

2. To a declaration claiming a sum recovered by a judgment in a French court, the defendant pleaded that he was not a native of France, or at any time before judgment resident or domiciled within the jurisdiction of the French court, or served with any process or summons in the suit, nor did he appear therein; nor had he any notice or knowledge of any process or summons, or any proceedings in the suit, or any opportunity of defending himself.

Replication, that the defendant was the holder of shares in a company having its legal domicile in Paris, and thereby became subject to all the liabilities, rights, and privileges attaching or belonging to shareholders, and in particular to the conditions contained in the statutes or articles of association. That by those statutes or articles, it was provided and agreed that all disputes arising during the liquidation of the company between the shareholders of the company, the administrators, the commissioners, or between the shareholders themselves, with respect to the affairs of the company, should be submitted to the jurisdiction of the French court; that every shareholder provoking a contest must elect a domicile at Paris, and in default election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses, &c., should be validly served at the domicile formally or impliedly chosen. That the company became bankrupt, and by the law of France the amount unpaid upon the defendant's shares became payable to the plaintiff as the company's assignee in bankruptcy; that the defendant made default, and provoked a contest; that he never elected a domicile; that the plaintiff thereupon caused a summons to be served at the office aforesaid, which summons required the defendant to appear in the said French court to answer the plaintiff's claim; that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular; and that the defendant was bound to appear, but did not, where-

upon the plaintiff recovered judgment by default against him for the amount unpaid on his shares:

Held (affirming the judgment of the Court of Exchequer), that the replication was good, although it did not allege that the defendant ever had any notice or knowledge of the statutes or articles, or of their provisions. *Copin v. Adamson.* 267, 270 note.

3. The power given to a defendant under the County Court Act, 1867, to apply to have a case tried in a county court where the claim indorsed on the writ exceeds £50, but such claim has been reduced by payment to a sum not exceeding £50, does not apply where the payment is made after action. *Osborne v. Homburg.* 297
4. A foreign creditor, residing out of the jurisdiction of the Court of Bankruptcy, by proving a debt in a bankruptcy or liquidation, brings himself within the general jurisdiction of the court as to the administration of the estate, just as if he were residing within it. An order can therefore be made on him to restore property of the bankrupt or debtor improperly in his possession.
5. A notice of motion was served out of the jurisdiction on the respondent. No order authorizing the service had been obtained from the court. The respondent appeared on the hearing of the motion, and objected to the jurisdiction of the court. On his objection being overruled, he asked for and obtained an adjournment to enable him to answer the case on its merits:

Held, that there had been a mere irregularity in the service, and that it had been waived. *Ex parte Robertson.* 585, 592 note.

See CRIMINAL LAW, 337.

LEX LOCI, 299, 307 note.

L.

LANDLORD AND TENANT.

See INJUNCTION, 443.

LIGHT, 436.

RENT, 743, 745 note.

WASTE, 475.

LARCENY.

See CRIMINAL LAW, 308, 373, 378 note.

LEASE

See INJUNCTION, 443.
LIGHT, 436.

LEGACY.

1. A testator bequeathed a legacy of £10,000 with interest from his death at 4 per cent. per annum to trustees upon trust to pay the income to certain persons during the life of one of them, and after her death upon trust for other persons.

2. The testator's estate was insufficient for payment in full of his legacies, and the realization of his assets occupied several years:

Held, that moneys from time to time received by the trustees and applicable to the legacy were divisible ratably between capital and income, so as to attribute to income £4 per cent. from the testator's death on the amount attributed to capital. *Matter of Twinkler's Estate*. 440

3. A condition in restraint of the second marriage whether of a man or a woman is not void.

4. A testatrix gave the income of certain property to her niece (who was her adopted daughter) and her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived his wife and married again:

Held (reversing the decision of Hall, V.C.), that the proviso was valid, and that the gift over took effect. *Allen v. Jackson*. 815, 823 note.

See LIFE ESTATE, 708.

SET-OFF, 525.

SUBSCRIBING WITNESS, 713, 720 note.
WILL, 528.

LEX LOCI

1. An English joint stock company, possessed of a pier at M., in Spain, instituted a cause of damage against an English steamship, which, it was alleged, had, by reason of the negligence of those in charge of her, come into collision with and damaged the pier. The owners of the steamship filed an answer, and therein alleged *inter alia* that the pier formed part of the land of Spain, and that by the law of Spain the master and mariners were alone answerable for the damage caused by the negligent navigation of the ship.

On motion to reject this portion of the answer:

Held, that the law of Spain was not applicable to the circumstances of the case, and that so much of the answer as pleaded that law must be struck out. *The Mexham*. 299, 307 note.

See DOMICIL, 724, 739 note.

LIBEL

See CRIMINAL LAW, 340, 345.

LIEN.

See BANKRUPTCY, 598.

SALE, 231.

STOPPAGE IN TRANSITU, 667.

LIFE ESTATE.

1. A fund was settled in trust for W., the illegitimate daughter of the settlor, for life, and in the event, which happened, of her not at her death being under coverture, for her absolutely; with a proviso that if any estate, interest, or benefit should, under the powers and provisions of the settlement, be undisposed of, or in the events which should happen would but for the proviso be held in trust for the Crown, or belong beneficially to the Crown, then and in every such case the estate, interest, or benefit should belong to and be held in trust for her father for life, and after

his death, for her mother. W. having died intestate, the Crown claimed the fund:

Held, that the fund vested absolutely in W. at her death, and that the gift over was repugnant and void; and consequently that the Crown was entitled to the fund. *Matter of Wilcock's Settlement.* 708

2. A testatrix devised and bequeathed her separate estate to her husband for life, and after his death to be divided amongst her five children, and if any of her children should die without issue, that then that child's share should be divided among the children then living; but if any child should die leaving issue, that issue should take its parent's share. The five children of the testatrix all survived the tenant for life:

Held (reversing the decision of Bacon, V.C.), that the estate was, at the death of the tenant for life, to be divided between the five children absolutely. *Olivant v. Wright.* 779

3. A testator, by a will dated in 1832, devised lands to T. during his natural life, and from and after his decease unto his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son then over. The legal estate in the lands was outstanding. T. died leaving an eldest son, a minor.

Held, by Hall, V.C., that the eldest son would, on attaining the age of twenty-one years, take an estate for life, and that the rents and profits in the meantime were undisposed of and went to the heir of the testator:

Held, by the Court of Appeal (reversing the decision of Hall, V.C.), that on the death of T., the eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one years, with an executory devise over in that event to T. in tail. *Andrew v. Andrew.* 824

4. Devise to C. M. for life, and in the event of his leaving a son born or to be born in due time after his decease who should live to attain the age of twenty-one, then to such son and his heirs if he should live to attain twenty-one, with remainder over:

Held, that on the death of C. M. his infant son took a vested estate in the devised property subject to be divested if he should die under twenty-one.

5. The rule in *Festing v. Allen* does not apply to such a case, there being a contrary intention shown in the words "born or to be born in due time after his decease." *Muskett v. Eaton.* '840

6. A testator gave his residuary real and personal estate to trustees on trust to convert and invest, and pay the income to his wife during widowhood, or until his son should attain twenty-two, and then to call in half the money invested and pay it to his son, and as to the other half, to pay the income to the wife during widowhood, and then to his son for life, and afterwards to his lawful issue:

Held, that the children and remoter issue of the son living at his death took together as joint tenants.

7. One of the son's daughters, who was unmarried at his death, married ten days afterwards, and had a child born six months after her marriage:

Held, that inasmuch as the child, though born within the period of gestation after the son's death, could have had no legitimate existence then, it was not within the class entitled to take. *Matter of Corlass.* 851

See HUSBAND AND WIFE, 607.

LIMITATIONS, STATUTE OF, 546, 557, n. SETTLEMENT, 794.

TRUSTS AND TRUSTEES, 563.

LIGHT.

1. An agreement to grant A. a lease, in a form set out in a schedule, of property in the city as soon as the house then in course of erection by A. on the property should be completed, contained a proviso that nothing therein contained should give A. a right to any easement which did not belong to the premises agreed to be demised as they then existed, nor to any right of light and air derived from over the houses opposite (which belonged to the lessors). The lease subsequently granted was of the land together with the house erected thereon, and all lights, easements, and appurtenances thereto belonging, in accordance with the scheduled form:

Held, that the grant by the lease of lights and easements was controlled

by the antecedent agreement, which was to be read as part of the lease; and that A. was not entitled to restrain the lessees of the opposite houses from building so as to obstruct the access of light and air to his premises from over such houses. *Salaman v. Glover*. 436

2. Where a building was being erected in a somewhat narrow street in the city of London, and had already reached a height which would subtend an angle of 45° at the foot of the ancient lights of the plaintiff's houses on the opposite side of the street:

Held, that the plaintiff was entitled to an injunction restraining the raising the new building to a greater height. *Hackett v. Baiss*. 459

LIMITATIONS, STATUTE OF.

1. T. W., in 1824, became mortgagee in fee of Blackacre. The form of the conveyance was to him on trust to sell, and out of the proceeds to retain the debt, and pay the surplus, if any, to the mortgagor. In February, 1826, T. W. made his will, whereby he devised all his real estate (except mortgage and trust estates) and all his personal estate to trustees, upon trust for Y. and H. He also devised to the same trustees all his mortgage estates upon trust, on payment of the moneys due, to convey the same to the person who should be entitled to the equity of redemption; and directed the moneys to form part of his personal estate. In March, 1826, the mortgagor of Blackacre became bankrupt; and in June, 1826, T. W. contracted with the assignees in bankruptcy for the purchase of the equity of redemption. The purchase-money was paid by T. W., but no conveyance from the assignees was ever executed. In October, 1826, T. W. died, leaving Y. and C. his co-heirs. C. by deed renounced to the trustees of the will all claim under the contract of June, 1826. The trustees under the will entered into receipt of the rents of Blackacre, and administered the same as part of the testator's estate until 1869.

Y. then claimed the right to a conveyance of one moiety of Blackacre as co-heir of T. W.:

Held, that the purchase of the equity

of redemption by the testator revoked the devise by his will, not only of the beneficial interest but of the legal estate in the mortgaged property; that no dry legal estate in Blackacre was remaining in the trustees of the will at the testator's death; that the mortgage estate had by the contract ceased to be a mortgage, and had become a new absolute interest; and that Blackacre was undisposed of by the will:

2. *Held*, further, that the claim of Y., as co-heir, against the trustees had become barred by the Statute of Limitations. *Yardley v. Holland*. 422

3. Lands limited in equity to T., F., and F.'s wife E. successively for life, with remainder to the first and other sons of F. and E. successively in tail male, with remainder to F. in tail general, with remainders over, were in the year 1835, without the consent of T., the protector of the settlement, by deed inrolled, reciting, contrary to the fact, the seisin in fee simple of F., conveyed by F., E. joining to transfer or bar her dower, to a purchaser in fee simple; and the purchaser then entered into possession. T. died in 1848, F. died without issue in 1859, and E. died in 1873:

Held, that until 1873 the possession of the purchaser was a possession by virtue of the subsisting life estates, and not of the estate tail in remainder of F., and, consequently, was not a possession the continuance of which for the period of twenty years would, under the 23d section of the Statute of Limitations, bar the remainders over. *Mills v. Capel*. 546, 551 note.

4. After a dissolution of partnership, by which the continuing partner covenanted *inter alia* to pay the debts and to pay the retiring partner a sum equal to half the next half-year's profits:

Held, that part payment of a debt by the continuing partner during the said half year could not be set up against the retiring partner as an answer to the Statutes of Limitation.

5. *Held*, also, that though the debt was from solicitors to a client in respect of moneys received, there was no express trust to exclude the operation of the statutes. *Watson v. Woodman*.

572, 582 note.

See SET-OFF, 525.

M.

MAINTENANCE.

1. A testator directed his trustees to pay to his widow the sum of £100 per annum for the maintenance and support of each of his children until he or she should attain twenty-one, with power to increase or decrease such allowance; and he empowered his trustees, with the consent of his widow, to advance any sums not exceeding in the whole one-fourth of the presumptive share of any child for his or her placing out or advancement in life, or otherwise for his or her benefit; the residue to be held in trust for all the children of the testator, who being sons should attain twenty-one, or being daughters should attain twenty-five or marry, without any provision for the maintenance of unmarried daughters during the interval.

On a petition by the trustees, under Lord St. Leonards' Act, for the opinion of the court :

Held, that the trustees had no power either under 23 & 24 Vict. c. 145, s. 26, or by way of interest on their contingent shares, to allow maintenance to unmarried daughters during the interval; but that the advancement clause enabled them to advance the necessary sums of money for the purpose.

2. *Seemle*, if the testator's estate were being administered by the court, interest on their contingent shares would have been given by way of maintenance :
3. *Held*, also, that the trustees would be justified in increasing the allowance for infant daughters of the testator so as to meet the expenses of education, as included in maintenance and support. *Matter of Breed's Will*. 705
4. Trustees may, under 23 & 24 Vict. c. 145, s. 26, apply for or towards the maintenance of an infant the income of property held on trust for the infant contingently on attaining the age of twenty-one years.
5. Where a fund was bequeathed upon trust for all the children of A. who should attain twenty-one in equal shares, and if there should be but one

such child, then for that child, and A. died leaving one infant child :

Held, that the income of the fund might be applied in the maintenance of the child. *Matter of Cotton's Estate*. 711

MALICE.

1. Meaning of "maliciously." 160 note.

MALICIOUS MISCHIEF.

See CRIMINAL LAW, 159, 160 note.

MANSLAUGHTER.

See CRIMINAL LAW, 161, 166 note.

MARRIED WOMEN.

See HUSBAND AND WIFE, SETTLEMENT, 525.

MARSHALLING ASSETS.

See DEBTOR AND CREDITOR, 720.

MASTER AND SERVANT.

1. Where two parties mutually agree, for a fixed period, the one to employ the other as his sole agent in a certain business, at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named.
A. and B. agreed "in consideration of the services and payments to be mutually rendered," that for seven years, or as long as A. should continue to carry on business at the town of L., A. should be the sole agent at L. for the sale of B.'s coals, and that B. would not employ any other agent at L. for that purpose. There were stipulations in the agreement that B. should have the entire control over the prices for which, and the credits at which the coals were to be sold; and that if A. could not sell a certain amount per

year, or B. could not supply a certain amount per year, either party might, on notice, put an end to the agreement. At the end of four years, B. sold the colliery itself. In an action by A. for damages for breach of the agreement, thereby occasioned:

Held, that the action was not maintainable; for that the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to L. *Rhodes v. Forwood*. 124

See NEGLIGENCE, 171.

MEMORANDA.

1. When and how witness may use to refresh memory, and when not. *Regina v. Langton*. 366, 370 *note*.

MESNE PROFITS.

See EJECTMENT, 262.

MISTAKE.

1. A family settlement will not be supported if founded on a mistake of either party to which the other party is accessory, although such mistake may have been innocently made.
2. A son, tenant in tail in remainder, shortly after attaining twenty-one joined with his father, the tenant for life, in re-settling the family estates. The son was influenced to make the re-settlement by the representation of his father that a portions' charge of £5,000 was not (as in fact it was) a subsisting charge on the estates, but was a charge to take effect only in case the father should so direct, and a release of the supposed power to charge contained in the re-settlement was the principal consideration for its execution:

Held, that, although this misrepresentation was innocently made, the re-settlement must be set aside as founded on mistake. *Fane v. Fane*. 552

See REFORMATION OF CONTRACTS, 536.

MOTION.

See SERVICE, 585, 592 *note*.

MOTIVE.

See CRIMINAL LAW, 199, 202 *note*, 328.

MUNICIPAL CORPORATION.

See ASSESSMENT AND TAXATION, 182.
WARRANTY, 28.

N.

NAME.

1. Devise upon condition shall take testator's. *D'Eyncourt v. Gregory*. 842

NEGLIGENCE.

1. Defendant was surveyor of highways, appointed by the vestry of a parish at a salary. By a resolution of the committee of management for the highways, appointed by the vestry, it was ordered that about 150 yards of a road should be raised, and the defendant, as surveyor, was directed to carry out the resolution. Defendant contracted with G. to do the labor at 3*d.* per yard, the vestry finding stones and materials. G. worked himself, and employed and paid his own men, and the defendant, as surveyor, employed men to cart materials to the ground. Defendant set the work out, and determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee. The work was carried out by raising one-half of the width of the road about a foot, leaving the other half at its old level; and a considerable length of road was so left without light or fencing at night;

and, in consequence of this, the dog-cart of the plaintiff, which he was driving along the road, was upset and he was injured. Defendant had been previously warned of the dangerous condition of the road. The jury found that leaving the road in its then state, without light or warning, was negligence; but that defendant did not personally interfere in doing the work, or directing the road to be left as it was:

Held, the court having power to draw inferences of fact, that the defendant was liable.

2. *Semble*, that s. 56 of 5 & 6 Vict. c. 50 (which imposes a penalty on a surveyor who causes any heap of stones or other matter to be laid on the highway, and allows it to remain there at night without proper precautions), did not apply to such a case. *Pendlebury v. Greenhalgh*. 171

3. The defendant, an agister of cattle, placed the plaintiff's horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field, and that there was no sufficient fence to keep it out. He did not, however, know that the bull was of a mischievous disposition. The horse was gored by the bull and killed, and in an action against the defendant for breach of contract to take reasonable care, the jury found for the plaintiff:

Held, that the fact that the defendant had no knowledge of the mischievous disposition of the particular bull was no ground for disturbing the verdict, as such knowledge was not essential to his liability under his contract as an agister to take reasonable care of the plaintiff's horse. *Smith v. Cooke*. 194, 199 *note*.

4. Railway company not restoring highway, stream, etc., not repairing bridge, etc., is town liable? 252 *note*.

See ANIMALS, 208, 217 *note*.
CARRIER, 208, 217 *note*.
CRIMINAL LAW, 161, 166, *note*.
RAILWAY COMPANY, 176.

NEGOTIABLE INSTRUMENT.

See BILLS OF EXCHANGE.
BONA FIDE, 166.

NEXT OF KIN.

See SET-OFF, 525.

NON-RESIDENT.

See CRIMINAL LAW, 331.

NUISANCE.

1. The words "purposes aforesaid," in sect. 32 of the Railways Clauses Consolidation Act, 1845, refer only to the purposes mentioned in that section. The remedy against the company in such cases may be by suit for injunction as well as by action for damages. An act is not "necessary" within the 16th section of the said act, merely because it enables the company to execute their works more economically.

2. Where a railway company for the construction of their works erected a mortar-mill on part of their land close to the place of business of the plaintiff, who complained of the injury and annoyance occasioned by the noise and vibration:

Held, that the mortar-mill was not necessary for the construction of the line, and an injunction granted accordingly. *Fenwick v. East London, etc.* 480.

See EMINENT DOMAIN, 520.

O.

OFFICER.

1. Effect of presiding officer refusing to act or absenting himself. *MacDougall v. Gardiner*. 388, 400 *note*, 624

See CRIMINAL LAW, 337.
STOCKHOLDERS, 388, 400 *note*, 624.

OWNER.

See ASSESSMENT AND TAXATION, 237,
242 *note*.

P.

PARENT AND CHILD.

See CRIMINAL LAW, 181, 166 *note*.
MAINTENANCE, 708, 711.

PAROL AGREEMENT.

See BANKRUPTCY, 746.

PAROL EVIDENCE.

See BANKRUPTCY, 746.

PARTNERS.

See LIMITATIONS, STATUTE OF, 572,
582 *note*.

PARTNERSHIP.

1. A., in June, 1869, borrowed £250 from B., and, at the time, signed a paper in the following words: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the Limited Partnership Act of the 28 & 29 Vict. c. 86, called an 'Act to amend the Law of Partnership:'"

Held, that this paper (which contained no provision as to the date or duration of the partnership) constituted a partnership at will; and that it was not put an end to by a letter, dated in August, 1872, in which A. promised to repay B. on the 1st of September, 1872, the principal sum together with interest thereon (treating it only as a loan) such as should, as on a calculation of one-eighth of the profits, be found to be due to B. on that day. This letter was followed by a tender, which was not accepted.

2. On a bill filed by B. for specific performance of the agreement to execute a partnership deed for one-eighth share of the profits, A. put in an answer in which he denied that there had been a partnership at all, but submitted that if any partnership had ever existed it was only a partnership at will, of one-eighth share of the profits (payment of which he offered to make), and he submitted that this partnership had been determined by the letter of August, 1872:

Held, that it had not been determined by that letter, but that the answer had the effect of putting an end to it; and that accounts must be directed to be taken as up to the day of filing the answer, and that these accounts must include the principal, the eighth share of the profits, and also the eighth share of the assets up to that day.

3. *Per* THE LORD CHANCELLOR (Lord Cairns): A copartnership in profits is a copartnership in the assets by which the profits are made.

4. *Per* LORD CHELMSFORD: In order to bring a case within the 28 & 29 Vict. c. 86, there must be a contract in writing, and the document must show on the face of it that the transaction is one of loan: and parol testimony to vary it is inadmissible.

5. In a case like the present the Court of Chancery has power, in its discretion, to grant either a sale of the undertaking as a going concern, or a proposal for a purchase (by the holder of the seven-eighth share) of the one-eighth share mentioned in the agreement. The House, under the circumstances here, adopted the latter course.

6. The decrees of the court below varied accordingly, and the cause was remitted to be dealt with according to the order of the House. *Sykes v. Sykes*. 52

7. By the decree in a suit a partnership between the plaintiff and defendant was dissolved, and the business and partnership property were ordered to be sold as a going concern, either party being at liberty to bid. Under a subsequent order the plaintiff became the purchaser, he having in the meantime been carrying on the business for the benefit of the purchaser. Under the

order approving of the purchase by him he was allowed to go into possession at once as purchaser. He continued in possession for some time, and ultimately became bankrupt:

Held, that under the circumstances the business and partnership property were in the order and disposition of the bankrupt with the consent of the true owner. *Graham v. McCulloch*. 401

8. By an agreement between A., B., C. and D., four partners in a mercantile business, after reciting, amongst other things, that all the partners had considerable sums of money employed in the business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business immediately after the retirement or decease of either of them, it was agreed between and by A., B., C. and D., that in case of either of them retiring from the copartnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner should not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said copartnership business immediately, but the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), should be repaid out of the business by the continuing or surviving partners by instalments, as therein mentioned, until the whole amount should be fully paid or discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they were to be at liberty to do:

Held, that the agreement was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and was not intended to alter the nature of the liability:

9. *Held*, further, that if the agreement did create a new liability, such new liability arising out of a contract by a mercantile partnership was in equity several, and not joint merely. *Beresford v. Browning*. 494, 508 note. See S.C. 637

10. By an agreement between A., B., C.

and D., four partners in a mercantile business, after reciting, amongst other things, that all the partners had considerable sums of money employed in the business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or advance from the said business immediately after the retirement or decease of either of them, it was agreed between and by A., B., C. and D., that in case of either of them retiring from the copartnership business, or departing this life during the continuance thereof, then and in such case the continuing or surviving partners or partner should not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the said copartnership business immediately, but the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), should be repaid out of the business by the continuing or surviving partners by instalments, as therein mentioned, until the whole amount should be fully paid or discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they were to be at liberty to do:

Held (affirming the decision of the Master of the Rolls), that the agreement was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and was not intended to alter the nature of the liability, which remained joint and several. *Beresford v. Browning*. 637.

See BANKRUPTCY, 70, 752.

CORPORATIONS, 762.

EXECUTORS AND ADMINISTRATORS, 494, 508 note.

LIMITATIONS, STATUTE OF, 572, 582, n.

PAYMENT.

See JURISDICTION, 297.

LIMITATIONS, STATUTE OF, 572, 582 note.

PER CAPITA.

See WILL, 406, 798,

PER STIRPES.

See WILL, 406, 798.

PERSONAL ESTATE.

See REAL ESTATE, 808.

POWER.

1. The donee of a testamentary power of appointment over a fund of £7,000 exercised the power by appointing sums of £1,995, £4,000, £4,000, and £5, amounting in all to £10,000. The appointee of one of the sums of £4,000 died in the testator's lifetime :

Held, that the other appointees, and not the persons who would take in default of appointment, were entitled to the benefit of the lapse.

2. Life and reversionary interests must be brought into hotchpot under the usual hotchpot clause. *Kales v. Drake*. 708

See APPOINTMENT.

LIFE ESTATE.

SETTLEMENT, 694.

PRACTICE.

1. On the argument of a case in the Court of Appeal two counsel will be heard on either side. *Snoesby v. Lancashire, etc.* 178

PRESUMPTION OF DEATH.

1. By a decree for administration in a County Court a sale of real estate devised to A. and six other persons parties to the suit was ordered, and an inquiry was directed before the Registrar of the court as to A., who had not been heard of for many years. On an affidavit being produced to the Registrar showing that A. had not been heard of for seventeen years, the sale was effected without any certificate as

to the result of the inquiry being made. The sale produced more than £500, and the cause was transferred to the Court of Chancery.

On motion by the purchaser to be discharged and to have his costs paid, on the ground that the sale was invalid as having been made before a certificate in answer to the inquiries had been made :

Held, that A. must be presumed to be dead without issue; and that, as all parties interested were in fact before the court at the hearing, and were willing to convey, and a good title could be made independently of the Partition Act, 1868, the purchaser was bound to accept such a title, and could not rely upon the technical informality in the decree. *Rawlinson v. Miller*. 644

2. When arises from absence and circumstances, and when not. 648 *note*.

PRINCIPAL AND AGENT.

See INSURANCE, MARINE, 179.

LIMITATIONS, STATUTE OF, 572,

582 *note*.

MASTER AND SERVANT, 124.

NEGLIGENCE, 171.

PRINCIPAL AND INCOME.

See HUSBAND AND WIFE, 607.

"PUBLIC PLACE."

See CRIMINAL LAW, 151.

R.

RAILWAY COMPANY.

1. A herd of plaintiff's beasts were being driven at 11 p.m. along an occupation road to some fields. The road crossed a siding of the defendants' railway on

a level, and while the cattle were crossing the siding the defendants' servants negligently sent some trucks down an incline into the siding, which separated the cattle from the drovers and frightened them, and they rushed away. Six of them were ultimately found at between 3 and 4 a.m. lying dead or dying on another part of the railway; and it appeared that they had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level crossing, had got into the garden through defect in the fence, and so on to the line:

Held (affirming the judgment of the Queen's Bench), that, as defendants had been guilty of negligence which caused the drovers to lose control over the cattle and caused the cattle to become infuriated, it was no answer that if the fence of the garden had not been defective the accident would not have happened; and that consequently the damages were not too remote. *Snessby v. Lancashire, etc.* 176

2. The defendants' predecessors in title obtained an act for the formation of a road which was to pass under a railway by means of a bridge. By the act it was provided that the undertakers should not enter upon or interfere with the railway, or execute any work whatsoever under or affecting the same, until they should have delivered to the company plans, drawings and specifications of the works intended to be executed under or affecting the railway and works thereof, such plans, &c., to describe the manner of executing the intended works, and the materials to be used for the purpose, nor until those plans, &c., should have been examined and approved by the engineer of the company; and that "the same works should be executed and thereafter maintained by the undertakers at their sole expense in all things, according to such approved plans, &c., under the superintendence and to the reasonable satisfaction of the engineer of the company." And it was further provided that the undertakers should from time to time be responsible for and make good to the company all costs, losses, damages and expenses which might be occasioned to the company by reason of the execution or failure of any of the intended works, or of any act or omission of the undertakers, &c.

The bridge was accordingly constructed of brick piers and iron pillars, of iron girders resting upon the piers and pillars, and of timber and wood-work. In the construction of the bridge, the brick and iron work was done by the defendants' predecessors in title, under the superintendence of the plaintiffs' engineer. The timber and wood-work,—the superstructure,—was done by the plaintiffs' engineer at the expense of the undertakers, and with materials provided by them.

The structure was completed in 1864. In 1872 certain repairs became necessary to the superstructure of the bridge, which repairs were executed by the company, who claimed to be reimbursed their outlay in so doing by the defendants, although the defendants had had no notice nor any knowledge or means of ascertaining that the repairs were necessary:

Held, that the plaintiffs were not entitled to recover the expenses so incurred. *London, etc., v. Flower.*

243, 252 *note*.

3. When may use highway, etc., how far must restore, when must keep bridge in repair, not restoring stream, etc.

252 *note*.

See ASSESSMENT AND TAXATION, 237, 242, *note*.

RATIFICATION.

See LIMITATIONS, STATUTE OF, 572, 582 *note*.

REAL ESTATE.

1. A testator, after giving certain legacies, devised a freehold house to A., B. and C., in trust for sale, the proceeds to be considered part of his personal estate, and gave his residuary real and personal estate to A., B. and C. A., B. and C. paid all the legacies except two out of other parts of the testator's estate, and kept the house unsold, granting a lease of it to a tenant. The house remained unsold for fifty years, and the two legatees permitted their legacies to remain during all that time unpaid, without requiring a sale or any formal security on the house:

Held, in a suit by the personal representative of C. against the real and personal representatives of the testator for the administration of his estate, that A., B. and C. had by their conduct elected to take the house as reconverted into real estate; that the assent of the unpaid legatees might be inferred; and bill dismissed accordingly. *Mulrow v. Bigg*. 803

See ASSESSMENT AND TAXATION, 237,
242, note.

RECEIVER.

1. In a suit by the purchaser of a coal mine to rescind the contract on the ground of fraudulent misrepresentations, it being essential that the mine should be kept in a going state, the court, upon the application of the purchaser, who was in possession of the colliery, appointed a receiver and manager until the hearing. *Gibbs v. David*. 379

2. Where, on a motion for a receiver, an order is made that a named person on giving security be appointed receiver, the appointment takes effect from the date of the order; and therefore where, after such an order and before the receiver so appointed perfected his securities, certain execution creditors who had not received notice of the appointment put the sheriff in possession of the goods over which the receiver was appointed:

Held, that immediately on notice being given of the appointment the sheriff ought to have been withdrawn. *Edwards v. Edwards*. 846

RECEIVING STOLEN GOODS.

See CRIMINAL LAW, 308.

REFORMATION OF CONTRACTS.

1. By a marriage settlement executed in pursuance of articles made under the order of the court on the marriage of a lady, an infant and a ward of court,

personality of the wife was limited on death of the husband and in default of children, both which events happened, to the wife, as she should by will appoint, and in default to her next of kin.

Upon her uncontradicted evidence that this was not in accordance with her intention:

Held, that she was entitled to have the settlement rectified by limiting the property, in the events which had happened to herself, her executors and administrators, absolutely; and declaration to that effect ordered to be indorsed on the settlement. *Smith v. Iliffe*. 536

See HUSBAND AND WIFE, 607.
MISTAKE, 552.

REMAINDER.

See LIFE ESTATE, 708, 779.

REMAINDERMEN.

See LIMITATIONS, STATUTE OF, 546, 551 &

RENT.

1. When the trustee of a liquidating debtor continues in possession of premises of which the debtor was tenant, not having disclaimed the lease, the landlord has a right, as against the trustee, to distrain, without obtaining any leave from the court, for rent accruing due after the commencement of the liquidation, even though it be rent which, under the terms of the lease, is payable in advance. *Ex parte Hale*. 743, 745 note.

RESCISSION.

See RECEIVER, 379.

RESIDENCE.

See DOMICIL, 724, 739 note.

RESISTING OFFICER.

See CRIMINAL LAW, 387.

REVERSION.

See LIFE ESTATE, 708, 779.

REVERSIONER.

See LIMITATIONS, STATUTE OF, 546, 551 *n.*

REVOCATION.

See LIMITATIONS, STATUTE OF, 422.

S.

SALE.

1. Where an unpaid vendor shipping goods under a contract of sale takes a bill of lading making the goods deliverable to his order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default. *Ogg v. Shuter.* 231

See STOPPAGE IN TRANSITU, 667.

SALVAGE.

See ADMIRALTY, 19.

SCIENTER.

See NEGLIGENCE, 194, 199, *note.*

SERVICE.

1. On non-resident or one who cannot be found after jurisdiction obtained. 592 *note.*
See JURISDICTION, 585, 592 *note.*

SET-OFF.

1. There is no rule that a debt due to joint creditors, which has been contracted by fraud, can be set off against a separate debt due from one of the joint creditors.
2. P., the solicitor of K. and R. (who were trustees of a marriage settlement), received on their behalf the sum of £4,000, and represented that he had invested the whole of it on mortgage. He did invest on mortgage two sums of £2,200 and £850, part thereof; but he never invested the balance of £950. The debt of £2,200 was (with the knowledge of K. and R.) paid off and received by P., and retained by him for reinvestment; but no reinvestment was ever made. P. died insolvent:
Held, that neither of the sums of £2,200 and £950 due from his estate could be set off against a separate debt due to the estate from K. *Middleton v. Pollock.* 467
3. An administrator is entitled to set off against the share of one of the next of kin in the intestate's estate, the whole of a debt of which part had become barred by the Statute of Limitations. *White v. Cordwell.* 525

See BANKRUPTCY, 286.

SETTLEMENT

1. Where a husband, a journeyman carpenter, was in the receipt of wages not exceeding 12s. a week, and had to support a wife and six children, the court settled the whole of an incoming fund, the property of the wife, but liable to the extent of the husband's interest to the claim of a creditor, upon the wife and children. *White v. Cordwell.* 525
2. Under a settlement real estate was limited to such uses as A. and B. should

by deed jointly appoint, and subject thereto to the use of A. for life, with remainder to the use of B. for life, with remainder to the first and other sons of B. in tail, with divers remainders over; and there was a power of sale vested in four trustees and exercisable at the request of A. and B., and the survivor of them. By a deed (which contained a recital that A. and B. were desirous of selling part of the settled property, and with a view to facilitate the sale and conveyance thereof to the respective purchasers, had agreed to execute the deed), A. and B., in exercise of the joint power of appointment, appointed part of the settled property to trustees upon trust for sale; and it was declared that the trustees should stand possessed of the proceeds upon the trusts intended to be declared by a deed of even date. No deed declaring the trusts was ever executed, and there was evidence to show that the deed of appointment was executed with the view of avoiding the trouble and expense of an application to the trustees to exercise the power of sale:

Held, that the disposition of the proceeds of sale was a question of intention; and that, both on the terms of the deed of appointment (independently of the evidence) and also having regard to the evidence, the proceeds of the sale remained subject to the trusts of settlement. *Biddulph v. Williams*. 694

2. By a post-nuptial settlement reciting an intention to make further provision for the children of the marriage, certain sums of stock were vested in trustees in trust for the wife for life, and after her decease upon trust for all and every the child and children of the marriage who being a son or sons should attain the age of twenty-one years, equally to be divided between or among them and their respective executors and administrators; and if there should be but one such child, the whole to be in trust for such one or only child, *his or her* executors and administrators. There followed a clause directing that the trustees should, during the minority of each of the said children, pay to the father, to be by him applied or not as he should think fit, and after his decease should apply, the income of the presumptive share of every such child for or towards *his or her* maintenance and education until *his or her* share

should become vested, *or he or she* should previously die:

Held (reversing the decision of the Master of the Rolls), that daughters who attained twenty-one were entitled to share in the fund.

4. *Semble*, daughters would not acquire a vested interest till they attained twenty-one. *Matter of Daniel's Trusts*. 794

See POWER, 703.

TRUSTS AND TRUSTEES, 563.

SEVERAL LIABILITY.

See LIMITATIONS, STATUTE OF, 572, 582, *note*.

PARTNERSHIPS, 494.

SEWERS.

See EMINENT DOMAIN, 520.

SHERIFF.

See AUCTIONEER, 408, 421 *note*.

SOVEREIGN.

See DISCOVERY, 44.

FOREIGN SOVEREIGN, 690, 693 *note*.

SPECIFIC PERFORMANCE.

1. Contract for the sale of an estate, vendor reserving "the necessary land for making a railway" through the estate to P. In a suit by the purchaser for specific performance:

Held, that the reservation was void for uncertainty, and that the contract could not be enforced:

2. *Held*, also, that, though the defence was raised by answer and not by demurrer, the bill must be dismissed with costs. *Pearce v. Watts*. 457
3. At the expiration in July, 1857, of a lease under which by assignment he

was in possession of property, B. signed an agreement to accept from A. a new lease for thirty-one years, at the same rent as was reserved by the old lease, and payment of £600 on the day fixed for completion (1st August, 1857), with interest if the lease should not be completed on the day fixed. A draft lease was sent to B. for his approval but was not returned, and no steps were taken by A. to press for completion. B. remained in possession and paid rent, but no payment of the £600 or interest was ever made or demanded. In 1871 A. died. On bill by her legal personal representative :

Held, that as B.'s possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the £600 from the 1st of August, 1857. *Shepherd v. Walker*.

580

See ARBITRATION, 463.

STAY.

1. A defendant, in a suit in chancery, gave judgment in an action at law "to be dealt with as the court shall direct":

Held, that although liberty to enforce the judgment would not generally be given until the merits of the case were disposed of, the court was not precluded from allowing execution to issue at an earlier stage of the cause. *Hodges v. Fincham*.

622

See DISCOVERY, 44.

FOREIGN SOVEREIGN, 690, 693, *note*.

STOCKHOLDERS.

1. There must be properly appointed directors to make a call or to declare a forfeiture of shares.
2. A declaration of forfeiture (for non-payment of a call) of shares in a company registered in Victoria under 27 Vict. No. 228, was made on the 18th

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of June, 1869, by a resolution of the board of directors, consisting of a quorum of three, H., B., and A., who had been elected (with two others) at a quarterly general meeting of the company held on the 14th of April, 1869; which meeting had been convened by advertisement, published on the 8th, 10th and 13th of April, for the election of a full board of directors. It appeared that H. and A. had been previously elected directors on the 14th of January, 1867, had not retired from office as provided by the rules of the company, but had continued to act as directors up to the 14th of April, 1869:

Held, that the said meeting of the 14th of April, 1869, having been held without due notice thereof, according to the rules of the company passed under the provisions of 27 Vict. No. 228, and of the business to be transacted thereat, the election of a full board of directors thereby was invalid, and consequently the subsequent declaration of forfeiture of the 18th of June, 1869, was also invalid. Even if H. and A. had before that election legally held office, they could not thereafter act under their former title, for the election of a full board, though invalid, necessarily involved the retirement of those, if any, who up to that time had legally held the office of director.

3. A declaration of forfeiture of shares invalid under the rules of a company registered under 27 Vict. No. 228, before Act No. 354 came into force, is not rendered valid by the latter act.

4. Mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture. *Garden, etc., v. McLister*.

1, 18 *note*.

5. Right of old to subscribe for new stock.

19 *note*.

6. Forfeiture of stock.

19 *note*.

7. Where a shareholder in an incorporated company filed his bill on behalf of himself and all other shareholders against the directors and the promoters of a bill in Parliament for a rival purpose, alleging an illegal payment of the company's money to such promoters to buy off their opposition, and praying that it might be replaced :

Held, on demurrer, that it was not sufficiently alleged in the bill that the payment was *ultra vires*:

8. *Held*, also, there being no allegation that the company would not sue, that it was not a case in which the suit could be maintained in its present form; and that the demurrer must be allowed, with leave to amend.
9. Observations on the exceptions to the general rule, that the company and not an individual corporator must sue when the trust funds of the company have been misapplied. *Russell v. Wakefield Waterworks*. 448
10. Under the jurisdiction to adjust the rights of the contributories amongst themselves given by the Companies Act, 1862, s. 109, the court will not under the winding up enforce an alleged contract by the promoters to indemnify persons signing the subscription contract against all liability in respect of the shares, by directing a call payable primarily by the promoters only.
11. The authority of the clerk of a solicitor engaged in getting up a railway company to bind the company by a representation to persons signing the subscription contract that they would not be called upon to pay anything unless the line was made and opened, discussed. *Addison's Case*, 514, 520 note.
12. No defence to call that subscription of others colorable. 520 note.
13. An individual shareholder in a company is entitled to file a bill against the directors on behalf of himself and all other shareholders except the defendants, if he alleges that the directors, or some of them, have so acted as to prevent a majority of the members from exercising a proper control over the affairs of the company.
14. The articles of association of a company gave power to the chairman at any general meeting of the company, with the consent of the meeting, to adjourn the meeting, and also provided for the taking a poll if demanded by five shareholders. At a general meeting of the company the adjournment of the meeting was moved, and on being

put was declared by the chairman, who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the chair. The shareholders who sided with the plaintiff then passed a resolution, among others, removing one of the directors:

Held, on bill filed by a shareholder averring these facts, and charging that the directors, or some of them, had combined to take this course with the view of stifling discussion, that this made a case of improper conduct, bordering upon fraud, which entitled the plaintiff to maintain his suit for restraining proceedings by the directors, which the plaintiff and his party desired to prevent. *MacDougall v. Gardiner*. 388, 400 note. See S. C. 624

15. The articles of association of a company gave power to the chairman at any general meeting of the company, with the consent of the meeting, to adjourn the meeting, and also provided for taking a poll if demanded by five shareholders. At a general meeting of the company the adjournment of the meeting was moved, and, on being put, was declared by the chairman, who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the room. One of the shareholders filed a bill on behalf of himself and all other shareholders except the directors, against the directors and the company, stating these facts, and alleging that the course taken at the meeting was taken in collusion with the directors, with a view of stifling discussion, and that the directors were intending to carry out certain measures injurious to the company without submitting the terms to a general meeting; and praying for a declaration that the conduct of the chairman was illegal and improper, and for an injunction to restrain the directors from carrying out the proposed arrangements without submitting them to the shareholders for their approval:

Held, on demurrer (reversing the decision of Malins, V.C.), that the bill could not be sustained, inasmuch as it violated the rule laid down in *Mozley v. Alston* and *Foss v. Harbottle*, and asked the interference of the court in

the internal management of the company.

16. Whether, on a motion for the adjournment of a meeting of shareholders, the votes ought to be taken according to the number of shareholders or of the shares they represent, *quære. MacDougall v. Gardiner.* 624

17. W. entered into an agreement with a person as trustee of an intended company for the sale to the company of a property for a certain sum in cash and a certain number of fully paid-up shares. The agreement was not to be binding unless adopted by the company when formed. The company was formed, and the agreement was set out in the articles. W. applied to the appellants to become directors, which they agreed to do upon his promising to transfer to them fully paid-up shares to qualify them. They acted as directors, and adopted the agreement for sale. The number of shares requisite for the qualification of a director was five, but after the completion of the purchase thirty paid-up shares were, by the direction of W., allotted to each of the appellants, and they were entered on the register as holders each of thirty fully paid-up shares, and received certificates to that effect. An order was afterwards made for winding up the company, and the Master of the Rolls settled them on the list of contributors for thirty unpaid shares each:

Held, on appeal, that the appellants, as to the shares allotted to them, stood in the same position as if those shares had been allotted to W. and transferred to them by him; and that, as there was no contract between them and the company that they would take shares independently of their accepting certificates stating them to be the holders of these fully paid-up shares, they could not be placed on the list of contributors as holders of unpaid shares; and the order of the Master of the Rolls was discharged without prejudice to any application that might be made against them under the Companies Act, 1862, sect. 165, or otherwise, on the ground that they had entered into a corrupt bargain with W. *Carling's Case.* 676

See CORPORATIONS, 487, 539, 762.
INSURANCE, MARINE, 179.

STOPPAGE IN TRANSITU.

1. Cotton was shipped at Charleston, in America, for carriage to Liverpool. The purchaser resided at Luddenden Foot, in Yorkshire. The cotton was consigned to the vendor's agent at Liverpool, to whom the bills of lading were also sent by the vendor, together with a bill of exchange for the price of the cotton, drawn by the vendor on the purchaser.

On the arrival of the cotton at Liverpool, the bill of exchange was sent by the vendor's agent to the purchaser, and upon its return accepted by him the bill of lading was sent to him. He then indorsed the bill of lading and sent it to the manager of a railway company in Liverpool, who paid the sea freight, and obtained possession of the cotton, which was then forwarded by the railway to Luddenden Foot Station. The invoice of the cotton which was sent to the purchaser described it as shipped by the vendor to Liverpool, consigned to order, for account and risk of the purchaser, Luddenden Foot. The bill of lading provided for the shipment of the cotton into the port of Liverpool, there to be delivered to order or assigns, he or they paying freight immediately on landing the goods:

Held, that the *transitus* prescribed by the vendor ended at Liverpool, and that after the cotton had been delivered there to the railway company as agents for the purchaser, the vendor had no right to stop it *in transitu*. *Matter of Gibbes.* 667

See SALE, 231.

SUBSCRIBING WITNESS.

1. When legacy to of will invalid, and when not. *Burton v. Newbery.* 713, 720 note.

SURVIVORS.

See WILL, 384.

T.

TAX.

See ASSESSMENT AND TAXATION, 182, 237, 242 note.

TENANT IN TAIL.

See LIFE ESTATE, 779.

TIMBER.

See FRAUDS, STATUTE OF, 218, 227 *note*.

TITLE.

See LIFE ESTATE, 708, 779.
 PARTNERSHIP, 401.
 RECEIVER, 846.
 SALE, 281.
 SETTLEMENT, 794.

TREES.

See FRAUDS, STATUTE OF, 218, 227 *note*.

TRESPASS.

See INJUNCTION, 448.

TRUSTS AND TRUSTEES.

1. The trustees of a trust fund to which their *cestui que trust* has become entitled in default of appointment by a tenant for life, are justified in paying it over to him on being informed in writing by the solicitor to the parties that he has reason to believe that no appointment has been made; and would be free from liability in doing so.
2. Trustees who under such circumstances pay the trust fund into court under the Trustees Relief Act will not, as a rule, be entitled to their costs. *Matter of Cull's Trusts.* 492
3. By a settlement trustees were directed to hold trust funds upon trust to pay the income to E. H. for life, and after her death, "leaving a child or children," to transfer, pay, and make over

the fund unto "all and every the child or children of the said E. H., and the issue of such of the said children as might be then dead" (such issue to take the parent's share), equally between them if more than one, the shares of sons to be transferred and paid at the age of twenty-one, and the shares of daughters at that age or marriage. Five of the children of E. H. survived her, and attained twenty-one or married, and one son of hers attained twenty-one and died without issue in her lifetime:

Held, that although the trust only took effect in case some one child survived E. H., the contingency upon which the trust took effect was not to be imported into the constitution of the class who were to take under the trust, and that the son who attained twenty-one and died in the lifetime of the tenant for life without issue took, nevertheless, a vested interest in the fund. *Matter of Orlebar's Trusts.* 563.

See APPOINTMENT, 509.
 MAINTENANCE, 706, 711.
 POWER, 708.
 SETTLEMENT, 694.

U.**ULTRA VIRES.**

See STOCKHOLDERS, 448.

UNBORN CHILDREN.

See LIFE ESTATE, 861.

UNCERTAINTY.

See SPECIFIC PERFORMANCE, 457.

USAGE.

See EASEMENT, 254.

V.

VENDOR AND PURCHASER.

See SALE, 281.
SPECIFIC PERFORMANCE, 530.
STOPPAGE IN TRANSITU, 667.

VENUE.

See JURISDICTION, 234, 236 note.

VESTED ESTATE.

See LIFE ESTATE.
SETTLEMENT, 794.
TRUSTS AND TRUSTEES, 563.

W.

WAGERS.

1. To a declaration on a check, the defendant pleaded that he had delivered the check to the plaintiff in respect of money alleged to be due from the defendant to the plaintiff upon a contract made between them by way of wagering, whereby it was agreed that the plaintiff should pay the defendant certain moneys, and that the defendant should employ them and certain moneys of his own in making bets and wagers upon the result of certain horse races, and should pay to the plaintiff a certain proportion of the winnings, and that, except as aforesaid, there was no consideration for the check. On demurrer:
Held, that the plea was bad, as the plaintiff was not seeking to recover on any contract or agreement by way of gaming or wagering void under 8 & 9 Vict. c. 109, s. 18. *Beeston v. Beeston*. 264

See INSURANCE, LIFE, 832, 837 note.

WARRANTY.

1. Where plans and a specification, for the execution of a certain work, are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification.
2. The contractor for the work cannot, therefore, sustain an action for damages, as upon a warranty, should it turn out that he could not execute it according to such plans and specification.
3. T. contracted with the defendants to take down an old bridge and build a new one. Plans and a specification prepared by the defendants' engineer were furnished to him, and he was required to obey the directions of the engineer. The descriptions given were stated to be "believed to be correct," but were not guaranteed; and, in one particular matter at least, he was warned to make examination for himself. Part of the plan consisted in the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wholly lost, and the bridge had to be built in a different manner. In this way much labor and time were wasted. The contract contained provisions as to the payment for extra work, and that work had (with the contract work) been duly paid for. The contractor sought for compensation for his loss of time and labor occasioned by the failure of the caissons, and in his declaration alleged that the defendants had warranted that the bridge could be inexpensively built according to the plans and specification. There was no express warranty to that effect in the contract:
Held, that none could be implied.
4. *Semble*, that if he had any remedy under these circumstances it was not in an action for damages as for breach of warranty, but for compensation as upon a *quantum meruit*. *Thorn v. Mayor of London*. 28

WASTE.

1. The lessee of land who erects a building thereon without the consent of his

lessor does not commit waste within the definition in Co. Lit. 53 a, unless it can be shown that such building is an injury to the inheritance.

2. The owner or lessee of houses let or sublet to weekly tenants cannot maintain a suit to restrain a temporary nuisance, such as the noise of machinery in adjacent premises, but
3. *Seemle*, such a suit could be maintained by a weekly tenant if the nuisance were of such a nature as to be injurious to his health or comfort. *Jones v. Chapel*. 475

See INJUNCTION, 443.

WATER AND WATERCOURSES.

See EMINENT DOMAIN, 520.

WAY.

1. The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farm house and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm:

Held (affirming the decision of Jessel, M.R.), that that did not establish a right of way for carting the materials required for building a number of new houses on the land.

2. *Seemle*, the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way

between that point and the gate. *Wimbeldon, etc., v. Dixon*. 783

WILFULLY.

1. Meaning of "wilfully." 160 *note*.

WILL.

1. A testator directed the income of the residue of his estate to be divided between all his sons as tenants in common, with benefit of survivorship between them, in case any or either of them should die without issue, and in case any child or children who should be entitled under the trusts of his will to any principal money, or income, should die leaving issue, the principal money, or share, from which the interest of such child or children should be derived, should go to and be divided amongst such issue as tenants in common.

The testator left five sons, two of whom died leaving issue, and three died without issue, the last survivor of the five dying without issue:

Held, that on the death of the last surviving son the principal set free accrued to the children of the sons who had died leaving issue. *Cross v. Malby*. 384

2. Gift of residue to be distributed "to my relatives, share and share alike, as the law directs."

Held, to mean a distribution under the Statute of Distributions, *per stirpes* and not *per capita*. *Flelden v. Ashworth*. 406

3. Testatrix by will bequeathed residuary personal estate unto and equally between all her brothers and sisters, share and share alike. She directed that the shares of her brothers respectively should not vest in them respectively until they should respectively attain twenty-one, and that the shares of her sisters should not vest in them respectively until they should respectively attain that age or marry:

Held, that the testatrix's brothers and

sisters formed one class only of persons; and that a brother not born, though *en ventre sa mère* when the eldest of the brothers and sisters who attained twenty-one came of age, was excluded; although he was born before the eldest of the brothers only who attained twenty-one came of age. *Garraff v. Weeks*. 528

4. Testatrix, in exercise of a power in a marriage settlement, by will, dated in 1845, devised, "All that and those messuage or tenement, houses, buildings, farm and lands, called H. . . . situate in the parish of L., containing by estimation eighty acres more or less . . . now in the occupation of J. C. or his assigns," to the use of the same J. C., his heirs and assigns.

At the date of the will, a farm called H. was in the occupation of J. C. It contained nearly 175 acres, of which about eighty-nine were freehold in the parish of L., about sixty-six were copyhold in the parish of L., and the remainder were copyhold in an adjoining parish:

Held, that not only the eighty-nine acres of freehold in the parish of L., but the whole of H. farm, passed by the devise.

5. Testatrix also devised "All that messuage or tenement, barn and lands thereunto belonging, situate in the parish of B. . . ." called by the name of "Claggetts and Sievelands," to the use of J. W., his heirs and assigns.

This description was identical in terms with a description in a schedule to the settlement; and it was followed in the same schedule by descriptions of six other pieces of land. At the date of the will, and for many years before and after, all seven pieces of land were in one occupation, and known as "Claygate Farm."

Held, that all seven parcels passed by the devise.

6. Testatrix also devised "All that capital messuage . . . and farm house, with the barns, buildings . . . gardens, orchards, lands . . . woods, wood-grounds, and appurtenances . . . commonly called T. . . . situate in the parish of E. G., in the occupation of A. B., his assigns or under-tenants," to the use of the same A. B., his heirs and assigns.

At the date of the will T. farm was situate in two parishes, E. G. and W. The farm house of T. was in W. Parish, and part of the farm buildings was in the parish of E. G. All were then in the occupation of A. B., except some woods which were kept in hand by the landlord, and never were in the occupation of A. B.:

Held, that the farm house, buildings, and all the lands of T. farm (except the woodlands, which fell into the residue), passed by the devise. *Whitfield v. Langdale*. 649.

7. A codicil, which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil.

8. A testator made a will (dated before the Wills Act), by which he directed his residuary real estate to be sold and the proceeds to be divided (in the events which happened) among twelve persons, of whom A. and B. were two. He made a first codicil (dated after the Wills Act), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. and B. He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:

Held, that the second codicil did not operate as a republication of the first codicil; that the gifts to A. and B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between A. and B. and the other ten residuary legatees. *Burton v. Newbery*.

713, 720 note.

9. A testatrix gave the income of one moiety of her residuary estate to her daughter Margaret for life, and the income of the other moiety to her daughter Mary Ann for life, and then directed her trustees to stand possessed of one moiety of her estate from and after the death of Margaret, and of the other moiety from and after the death of Mary Ann, in trust to pay, transfer, and assign the same unto and amongst all the children of Margaret living at

her decease, and the issue then living of any children of hers who should have died in her lifetime, and all the children of Mary Ann who should be living at her decease, and the issue then living of any children of hers who should have died in her lifetime, to be equally divided between or among them if more than one, and if there should be but one such child and no issue of any deceased child, or no such child and only one grandchild of such other issue, then the whole to such one child, grandchild, or other issue; the issue of a deceased child taking their parent's share :

Held (affirming the decision of Bacon, V.C.), that the full and elaborate language of the will, which clearly imputed a distribution of the whole fund *per capita* among the children of both daughters could not be controlled on the ground of the inconvenience of keeping a moiety of the fund in suspense from the death of one daughter till the death of the other, though in some cases, where the language was very concise and obscure, the court had held the share of each of the tenants for life divisible on his death among his own children exclusively. *Swabey v. Goldie*, 798

10. Under a name and arms proviso requiring a devisee to take the testator's surname:

Held, that adding the testator's sur-

name before his own was not a compliance by the devisee, but that adding the testator's surname after his own was so. *D'Eyncourt v. Gregory*. 842

See APPOINTMENT, 509.

ILLEGITIMATE CHILDREN, 741.

LEGACY.

LIFE ESTATE.

LIMITATIONS, STATUTE OF, 422.

WORDS.

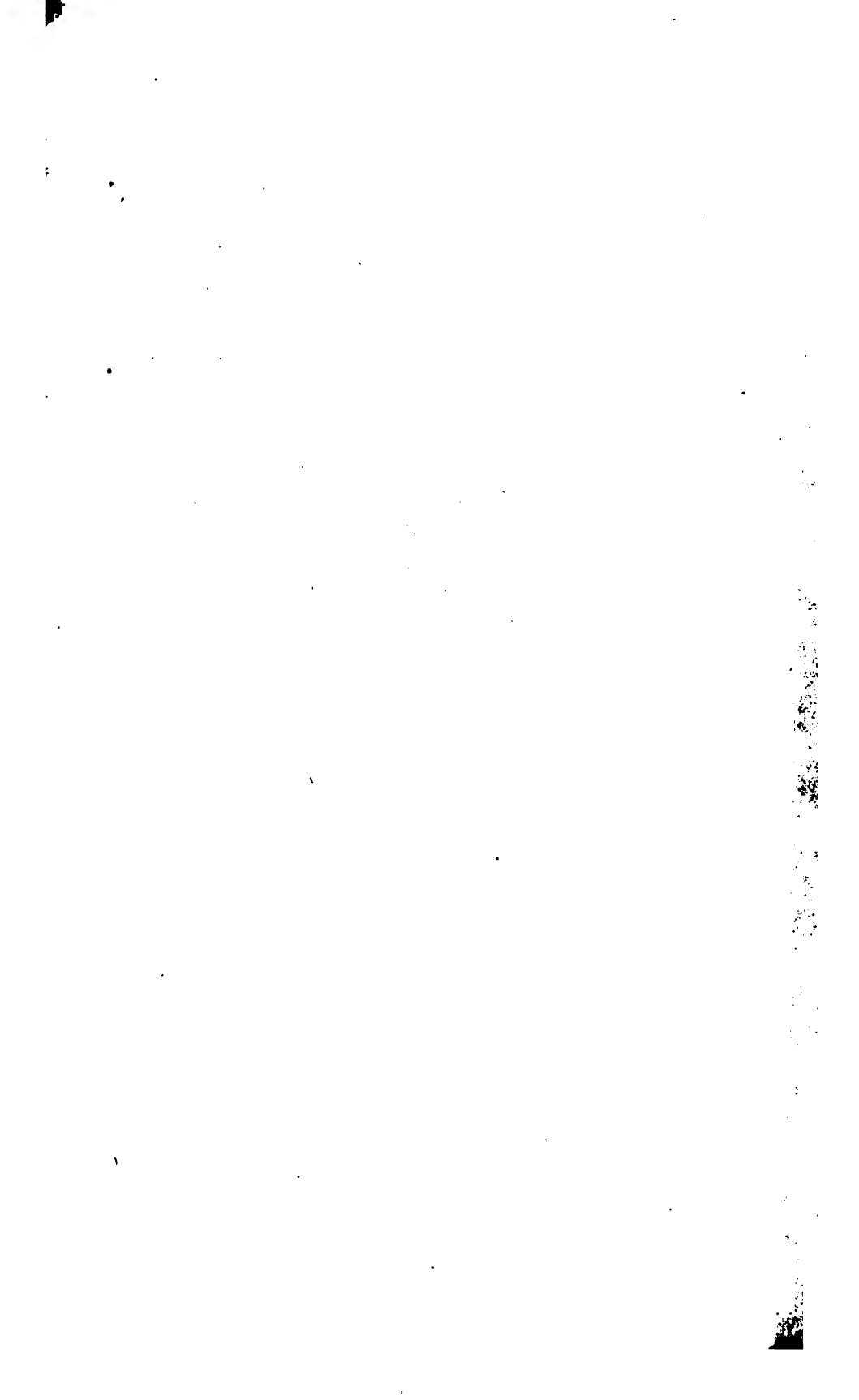
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|---|--------------------|
| "Children," | 741 |
| "Die without issue," | 779 |
| "Houses forming street," | 182 |
| "Issue, die without," | 779 |
| "Lands," | 242, <i>note</i> . |
| "Leaving a child or children," | 563 |
| "Others," | 384 |
| "Owner," | 242, <i>note</i> . |
| "Public place," | 151 |
| "School house," | 182 |
| "Share and share alike, as law directs," | 406 |
| "Survivors," | 384 |
| "Who shall attain the age of twenty-one," | 840 |
| "Wilfully," | 160, <i>note</i> . |

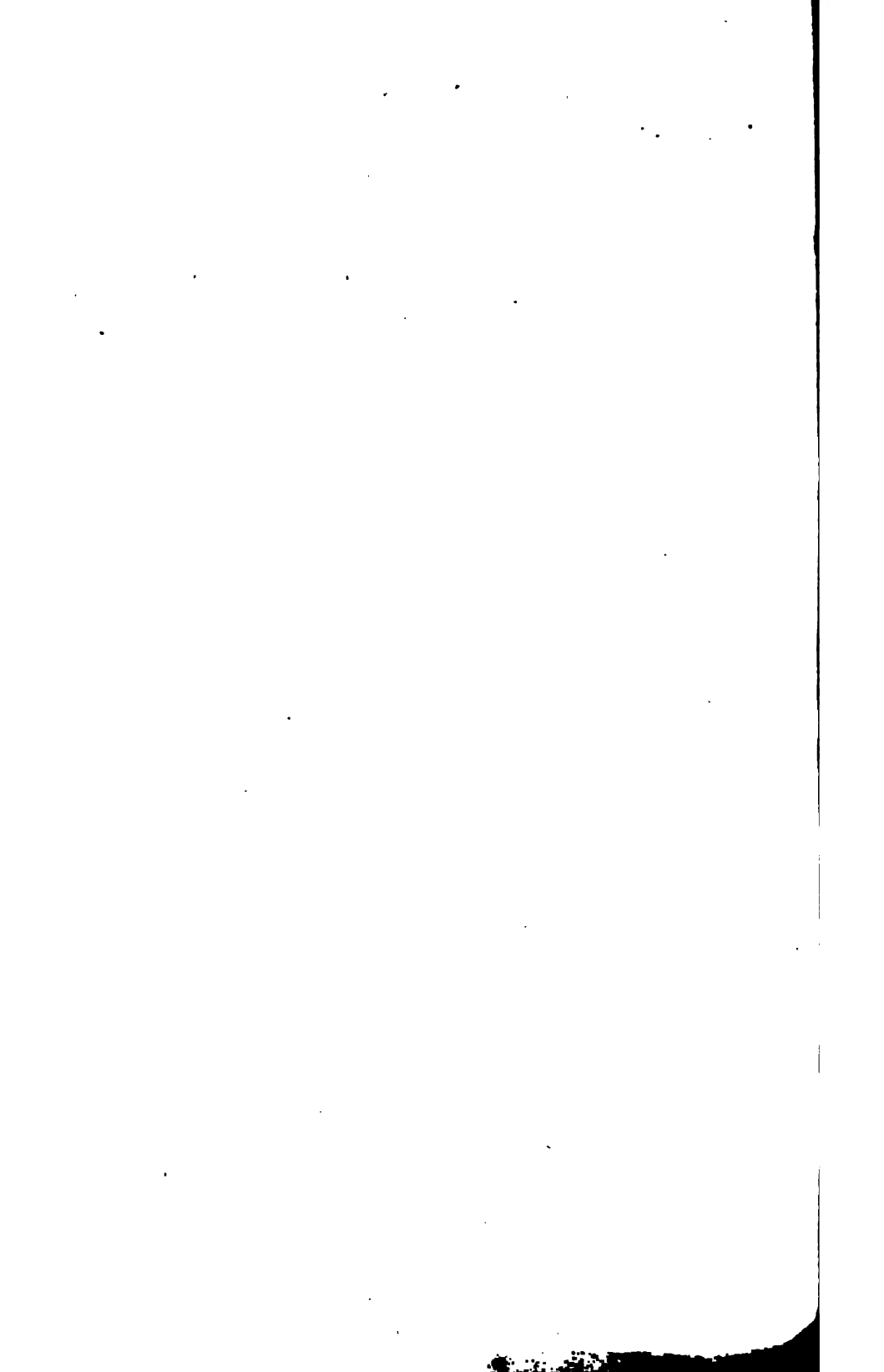
WORK AND LABOR.

See MASTER AND SERVANT.









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